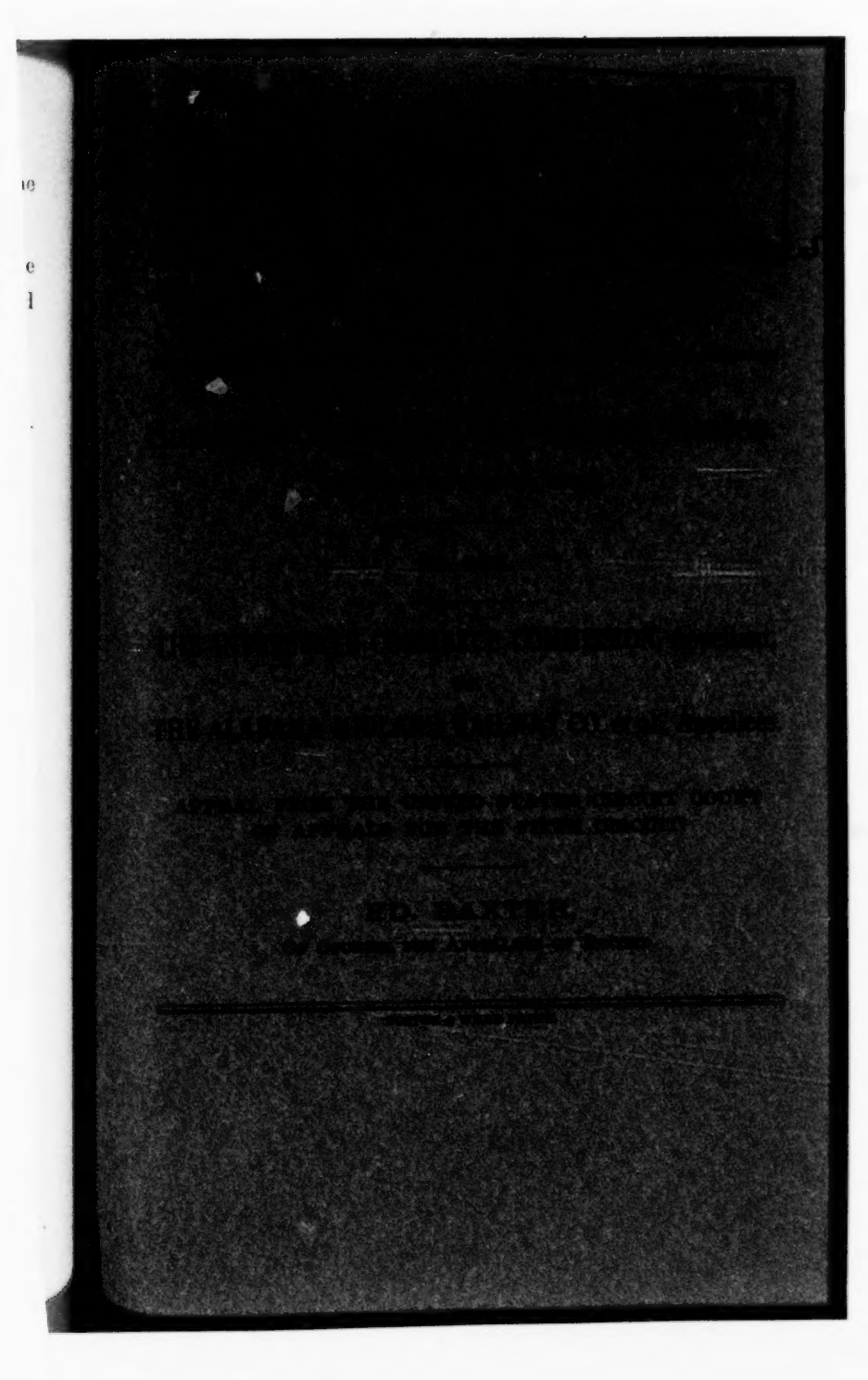

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 563.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE ALABAMA MIDLAND RAILWAY CO. et al., Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I.

STATEMENT OF CASE.

This is an appeal by the Interstate Commerce Commission from a decree rendered by the United States Circuit Court of Appeals, Fifth Circuit, affirming a decree of the Circuit Court of the United States for the Middle District of Alabama.

Trans., pp. 408, 409.

The decree of the Circuit Court dismissed a petition filed in said Court, by said Commission, to enforce certain orders made by said Commission, in the case of the Board of Trade of Troy, Alabama, against the Alabama Midland Railway Company et al.

Trans., p. 134.

II.

PROCEEDINGS BEFORE THE COMMISSION.—PETITION.

The Board of Trade of Troy, Alabama, filed a petition before the Interstate Commerce Commission against the Alabama Midland Railway Company, the Central Railroad & Banking Company of Georgia and a number of other railroad companies,

than is charged and collected on such shipments from Montgomery aforesaid, *through* Troy to said ports."

3. "On shipments of cotton from Troy aforesaid, *for export* through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point, or Norfolk, no higher rate of charge to these ports, than is charged and collected on such shipments from Montgomery aforesaid."

4. "On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments *through* Troy to Montgomery aforesaid."

5. "On class goods shipped from Louisville, Ky., St. Louis, Mo., or Cincinati, O., to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Ga., and Eufaula, Ala."

6. "On shipments of cotton from Troy aforesaid, through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cents per hundred pounds."

Trans., p. 69.

IV.

Proceedings in the Circuit Court.

The defendants conceiving that said order of the Commission was illegal, and desiring to obtain the opinion of the Court upon it, declined to obey it.

The Commission thereupon filed its petition in the Circuit Court against the same defendants, praying for an injunction to restrain them from further continuing in their violation of, and disobedience to said order; and that upon final hearing such injunction may be made perpetual.

Trans., pp. 1–10.

The proceedings had before the Commission were filed as exhibits to the petition in the Circuit Court.

The defendants filed their answers, or other defenses in the Circuit Court.

The testimony taken before the Interstate Commerce Commission was filed in the Circuit Court.

Trans., pp. 132–162.

The Commission took the depositions of thirteen witnesses in the Circuit Court.

Trans., pp. 219–268, 392–397.

And the defendants took the depositions of twenty-two witnesses in the Circuit Court.

Trans., pp. 268–391.

The cause was heard in the Circuit Court, upon the pleadings, testimony, and argument of counsel; and upon consideration thereof it was ordered and decreed that the cause be dismissed.

Trans., p. 124.

A written opinion was filed by Hon. John Bruce, Judge.

Trans., pp. 120–124.

The Commission prayed and obtained an appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

Trans., pp. 125, 126.

V.

Proceedings in the Circuit Court of Appeals.

The cause was heard in the Circuit Court of Appeals; and the decree of the Circuit Court was affirmed.

Trans., p. 408.

Judge McCormick delivered the written opinion of the Court.

Trans., pp. 412–419.

The Interstate Commerce Commission prayed and obtained an appeal to this Court.

Trans., p. 412.

VI.

STATEMENT OF FACTS.

Troy, Alabama.

Troy is situated at the intersection of the Alabama Midland Railway, which is a part of the Plant System, and the Mobile & Girard Railroad, which is a part of the Georgia Central System.

There is no other railroad at Troy; and it has no water transportation.

T. H. Moore, Trans., p. 221.
B. M. Talbott, Trans., p. 224.
Jacob Greil, Trans., p. 283.
M. B. Houghton, Trans., pp. 286, 287.
W. F. Vandiver, Trans., p. 291.
H. M. Hobbie, Trans., p. 298.

It is about fifty-two miles east of the Alabama River.
Trans., p. 55, left col.

And it is about ninety miles west of the Chattahoochee River.
W. R. Moore, Trans., p. 318.

Its population is between 3,000 and 4,200.
T. H. Moore, Trans., p. 221.
B. M. Talbott, Trans., pp. 224, 225.
M. B. Houghton, Trans., pp. 286, 287.
H. M. Hobbie, Trans., p. 298.

There are between 35,000 and 40,000 bales of cotton handled at Troy annually.
B. M. Talbott, Trans., p. 225.
T. H. Moore, Trans., p. 222.

There are about eighty firms engaged in general merchandise and groceries. Five of them are wholesale and retail combined. There is only one firm that is a strictly wholesale house. The remainder are retail houses.
B. M. Talbott, Trans., pp. 225, 224.
Jacob Greil, Trans., p. 283.

The manufacturing enterprises of Troy consist of 1 cotton mill, 1 fertilizer factory, 1 oil mill, 2 saw mills, 1 furniture fac-

tory, 1 ice factory, 1 machine shop, 1 water works, 1 electric light plant, and 1 compress.

B. M. Talbot, Trans., p. 224.

The volume of trade of Troy, yearly, is about two and a quarter million dollars.

B. M. Talbott, Trans., p. 225.

VII.

Montgomery, Alabama.

Montgomery is situated, practically, at the head of navigation on the Alabama River. It has the following independent trunk lines or systems of railroads, viz.:

1. The Alabama Midland Railway which is a part of the Plant System.
2. The Louisville & Nashville Railroad.
3. The Georgia Central Railroad.
4. The Western Railway of Alabama.
5. The Savannah, Americus & Montgomery Railway.

T. H. Moore, Trans., p. 221.
M. B. Houghton, Trans., p. 286.
W. F. Vandiver, Trans., p. 291.
H. M. Hobbie, Trans., p. 298.

The Western Railway of Alabama runs from Selma, Ala., via Montgomery, to West Point, Ga.; and the Louisville & Nashville Railroad, runs from Cincinnati and St. Louis, via Montgomery, to New Orleans. The result is that though there are but five independent railroad systems at Montgomery, the railroads of those systems radiate from Montgomery in seven directions and make Montgomery an important railroad center.

H. M. Hobbie, Trans., p. 298.
M. B. Houghton, Trans., p. 286.
W. F. Vandiver, Trans., p. 291.

The population of Montgomery is between 30,000 and 35,000.

M. B. Houghton, Trans., p. 286.
H. M. Hobbie, Trans., p. 298.

There are between 130,000 and 175,000 bales of cotton handled at Montgomery annually.

T. H. Moore, Trans., p. 221.
A. M. Baldwin, Trans., p. 306.
W. F. Vandiver, Trans., p. 291.
H. M. Hobbie, Trans., p. 298.
M. B. Houghton, Trans., p. 286.

There are 563 mercantile and industrial firms in Montgomery.

Trans., p. 158.

Her wholesale and retail merchants are very largely engaged in all lines and classes of business; reaching out not only into Alabama, but also into the States of Georgia, Florida and Mississippi.

W. F. Vandiver, Trans., p. 290.
H. M. Hobbie, Trans., p. 298.

The wholesale and retail trade and commerce of Montgomery is estimated as high as $40,000,000.

M. B. Houghton, Trans., p. 286.
H. M. Hobbie, Trans., p. 298.

Montgomery has about 115 manufacturing establishments of various kinds, as estimated. She manufactures beer, soap, ice, cars, fertilizers, cotton seed oil, cotton seed meal, confectioneries, barrels, engines, cane mills, cotton presses, wagons, buggies, sacks, brooms, and various other articles.

M. B. Houghton, Trans., p. 286.

She has three large compresses for cotton.

W. F. Vandiver, Trans., pp. 290, 291.
H. M. Hobbie, Trans., p. 299.

She also has three cotton factories whose headquarters are in the city.

H. M. Hobbie, Trans., p. 299.

The tonnage for the year ending March 1, 1892, received by the various railroads at Montgomery *proper*, was 18,829,877 lbs. The tonnage of West, and Southwest freight, received for Montgomery *and connections*, during said year, was 647,880,688 lbs., or 21,596 car loads.

Trans., p. 158.

The business on the Alabama River, according to the report of the United States engineer, for the year 1891, was 52,349 bales of cotton, and 44,500 tons of other freight, carried by boat. The value of the commerce on said river for 1891 was $8,175,650.

Trans., p. 159.

VIII.

Columbus, Georgia.

Columbus, Ga., is situated on the Chattahoochee River. Its population by the Census of 1890, was 18,650. There are the following rail lines at Columbus:

The Central Railroad, whose lines extend northwardly, northwestwardly, westwardly, southwestwardly, eastwardly, and southeastwardly.

The Columbus Southern, whose line extends southeastwardly.

The Georgia Midland & Gulf Railroad, whose line extends northeastwardly.

The Chattahoochee River runs southwardly to the gulf at Apalachicola, and is navigable for steamboats the year round.

W. R. Moore, Trans., p. 319.

J. Joseph, Trans., p. 323.

IX.

Eufaula, Alabama.

Eufaula is situated on the Chattahoochee River about 105 miles south of Columbus, and about 255 miles north of Apalachicola.

J. Joseph, Trans., p. 323.

The Central Railroad of Georgia crosses the Chattahoochee River at Eufaula, and from that point one of its lines runs northwestwardly; one of them runs southwestwardly; and one of them runs eastwardly.

By means of steamboats on the Chattahoochee River, Eufaula is connected with the system of railroads centering at Columbus.

Eufaula also connects by steamboats with the Savannah, Americus & Montgomery Railway, which crosses the Chatta-

hoochee River between Eufaula and Columbus. That railway extends northwestwardly to Montgomery, Alabama; and eastwardly in the direction of Savannah.

Eufaula also connects by steamboats with the Alabama Midland Railway, which crosses the Chattahoochee River below Eufaula, and which runs northwestwardly to Montgomery, Ala., and southeastwardly to Bainbridge, Ga.

Eufaula also connects at River Junction with the Louisville & Nashville Railroad, which runs eastwardly to Pensacola, Mobile and New Orleans; and at the town of Chattahoochee, opposite River Junction, boats from Eufaula connect with the Savannah, Florida & Western Railway, running northeastwardly to Savannah, and with the Florida, Central & Peninsula Railroad running eastwardly to Jacksonville.

At Apalachicola, Fla., steamboats from Columbus and Eufaula connect with ocean and gulf steam and sail vessels.

R. Q. Edmonson, Trans., 348.
J. W. Tullis, Trans., p. 309.
J. G. Guice, Trans., p. 335.

The population of Eufaula and its suburbs is between 6,000 and 7,000.

A. Berringer, Trans., p. 326.
John O. Martin, Trans., p. 313.
J. G. Guice, Trans., p. 336.
R. Q. Edmonson., Trans., p. 348.

The amount of cotton annually handled at Eufaula is between 40,000 and 50,000 bales.

J. G. Guice, Trans., 336.
R. Q. Edmonson, Trans., p. 348.

There are at Eufaula the following manufactories: 1 oil mill, 2 cotton mills, 1 sash, door and blind factory, 2 carriage and wagon factories, 1 milling business, 1 gas works, 1 electric light works, 1 bagging factory, 1 ice factory, 2 brick plants, 1 marble works, 1 guano factory, 1 bottling works, and 1 compress, employing in all between 500 and 700 hands.

R. Q. Edmonson, Trans., p. 348.
J. G. Guice, Trans., p. 336.
A Berringer, Trans., p. 326.
John O. Martin, Trans., p. 313.

X.

The Alabama River—Period of Navigation.

The Alabama River is navigable every month in the year by steamboats between Montgomery and Mobile; but for two months in the year it is navigable only by very light draft boats and barges.

T. H. Moore, Trans., p. 220.
Jacob Greil, Trans., pp. 282, 283.
M. B. Houghton, Trans., p. 285.
W. F. Vandiver, Trans., p. 289.

The average time required for a boat to go from Montgomery to Mobile and return is one week.

T. H. Moore, Trans., p. 220.
Jacob Greil, Trans., pp. 282, 283, 284.
M. B. Houghton, Trans., p. 285.
W. F. Vandiver, Trans., p. 292.
H. M. Hobbie, Trans., p. 297.

Three steamboats are run regularly during the summer months, arriving at Montgomery every Tuesday, Thursday, and Friday, leaving Mobile every Monday, Tuesday, and Saturday, each making the round trip once during the week. In the winter time a fourth boat is run during the busy season.

W. F. Vandiver, Trans., p. 289.

The time above stated, as required for a boat to go from Mobile to Montgomery and return, includes making all the landings and attention to a large local business. If a boat were run through without doing local business it could easily make two trips per week.

M. B. Houghton, Trans., p. 285.
Jacob Greil, Trans., p. 283.
W. F. Vandiver, Trans., p. 292.

XI.

The Alabama River—Number of Steamboats.

There are four steamboats running on the Alabama River, viz.: "Nettie Quill," 400 tons; "Carrier," 200 tons; "Tinsie Moore," 200 tons; "D. L. Tallie," 400 tons. There is also one other steamer, the "Alto," 400 tons, which is not in service in times of low water.

W. F. Vandiver, Trans., p. 293.
T. H. Moore, Trans., p. 220.
H. M. Hobbie, Trans., p. 297.

Said steamboats are owned and operated by the following lines, viz.:

The People's Line, owned by merchants and property owners in Montgomery and Selma, operates the "Tinsie Moore."

The Quill Line, owned by a private company in Mobile, operates the steamboats "Nettie Quill" and "Carrier."

Two citizens of Mobile own and operate the steamboat "Alto."
W. F. Vandiver, Trans., p. 289.

In the event it should become necessary, on account of the high rail rates, all boats necessary to do the bulk of the business done at Montgomery, could be procured for the river service; and all vessels necessary in connection with said river boats, for ocean traffic, could be obtained.

Jacob Greil, Trans., p. 285.

In the event rail rates should be advanced, or any unfair discrimination should be made against Montgomery, it is practicable to obtain all the steamboats necessary to do all the business from the Eastern and Western points to Montgomery; and vessels can be obtained to come from foreign ports to Mobile.

M. B. Houghton, Trans., p. 288.

XII.

The Effect of the Navigability of the Alabama River Upon Railroad Rates at Montgomery.

In 1886, the Merchants of Montgomery, on account of the high rates enforced at Montgomery, as compared with Mobile, organized a stock company in Montgomery, with a capital of $35,000, and bought the steamers "Alabama" and "Jewel," having each a capacity of 400 tons. They ran on the Alabama River for two years, until they succeeded in securing an adjustment of rates more satisfactory to them, but still not such rates as placed them on an equality with Mobile.

W. F. Vandiver, Trans., p. 289.

During that period, said steamboats did a flourishing business, and made money until the rail rates were reduced to Montgomery to such a point as compared with Mobile, that there was not margin enough to sustain them; and they eventually quit the business; but not until after they had won their fight, and forced the railroads to reduce their rates to Montgomery.

W. F. Vandiver, Trans., p. 293.

T. H. Moore, Trans., p. 221.

Jacob Greil, Trans., p. 282.

During that period, the largest proportion of shipments to Montgomery came via Mobile to Montgomery by boats. When the railroad rates were reduced to a point satisfactory to the merchants at Montgomery such shipments again went to the railroads; and since then comparatively little *through* business has been done by the boats.

Jacob Greil, Trans., p. 285.

In 1890 the Montgomery merchants were advised that the railroads were agitating the question of increasing the rates to Montgomery; and becoming alarmed, lest it might be done, they decided to organize what is known as the People's Line, buy the steamer "Tinsie Moore," and place her on the Alabama River, to protect the interests of the Montgomery merchants, in case an emergency should arise that would make her use necessary. Said boat is and will be retained in the Alabama River.

W. F. Vandiver, Trans., pp. 289, 290, 293.

The Alabama River is a competitor against the rail rates at Montgomery.

T. H. Moore, Trans., p. 221.

There is organized water opposition to the railroads on the Alabama River, both from the East and the West.

W. F. Vandiver, Trans., p. 290.

The fact that the Alabama River is navigable for steamboats between Montgomery and Mobile, compels the railroads to reduce their rates in proportion to the Mobile rates for the purpose of taking business away from the boat lines. The rates from New York, Cincinnati, St. Louis, New Orleans, or any other point to Montgomery, can never materially exceed the rates from those points to Mobile, plus the steamboat rates from Mobile to Montgomery.

T. H. Moore, Trans., p. 220.

The fact that the Alabama River is navigable for steamboats between Montgomery and Mobile, has the effect of restraining railroads from exacting undue rates from Montgomery merchants.

H. M. Hobbie, Trans., p. 297.

It has the effect of enabling shippers to send their freight by river at low rates, and of keeping down the rates charged by the railroads between those places.

J. H. Clisby, Trans., p. 303.

It is the only cause of keeping down the rates charged by railroads between those two cities.

Jacob Greil, Trans., p. 282.

The rail rates between those two cities are lower than formerly, and the reduction has been caused by water competition.

W. F. Vandiver, Trans., p. 290.

The fact that the Alabama River is navigable by steamboats between Montgomery and Mobile has the effect of making the rates charged by railroads between those points lower than they otherwise would be.

M. B. Houghton, Trans., p. 285.

The presence and use of steamboats in the Alabama River prevent the railroads from advancing rates.

W. F. Vandiver, Trans., p. 290.

In case the railroads, at any time, should increase their rates, a large proportion of the through business, both from the East and West, would again go to the boats.

Jacob Greil, Trans., p. 285.

And the through business which the boats would then receive would maintain them.

Jacob Greil, Trans., p. 284.

The Rates between Montgomery and Mobile are lower than rates from either Mobile or Montgomery to many intermediate points (where there is no competition), and even this does not secure all the business to the rail line; because the boats haul freight from Mobile to Montgomery and Montgomery to Mobile cheaper than the established rail rates. Notably, lately there has been considerable cotton-seed oil and meal hauled by boat from Montgomery to Mobile.

W. F. Vandiver, Trans., p. 290.

There are at present, and have been for a number of years, many thousand bales of cotton shipped out of Montgomery by river via Mobile, and thence by rail to New Orleans. This is being done to a considerable extent even with the present adjustment of rates.

W. F. Vandiver, Trans., p. 291.

XIII.

Shipments from New York, Baltimore and Other Northeastern Points to Montgomery via Mobile and the Alabama River.

Shipments have been received by river at Montgomery which came via Mobile, and which originated in Boston, New York, Philadelphia, Baltimore, and other eastern cities. Some of them from the East came by the "Benner Line" to Mobile by schooner, and a good many are made from the East to Savannah (by water) from Savannah to Mobile by rail, and from Mobile to Montgomery by river. This is done very often to get the benefit of cheaper rates; it being cheaper to ship from Savannah by rail to Mobile, and thence by river to Montgomery, than to ship by rail direct to Montgomery.

T. H. Moore, Trans., p. 220.

Such shipments consisted of dry goods, boots and shoes, starch, snuff, soap, coffee, etc.

T. H. Moore, Trans., p. 222.

They also consisted of sugars, spices, peppers, shot, mackerel, canned goods, etc.

Jacob Greil, Trans., pp. 282, 283.

A certain merchant at Montgomery claims that on account of high rail rates in 1886, he began shipping all goods, such as coffee, sugar, syrup, bagging and ties, case goods, etc., coming from New York, Philadelphia, Boston, and other eastern points, via Mobile, and from there to Montgomery by river. Such shipments came every two weeks and continued for two years.

H. M. Hobbie, Trans., pp. 297, 299.

Another merchant at Montgomery states that he has received at Montgomery shipments by river which came via Mobile from Boston, New York, Philadelphia, Baltimore, and other eastern cities; that said shipments extended over a period of some two or three years, and that he is making such shipments now by sailing vessels to Mobile and by steamboats to Montgomery; though not in such large quantities as he did formerly.

Jacob Greil, Trans., p. 282.

Another merchant at Montgomery states that except the last year preceding the taking of his deposition, he had shipped large quantities of bagging, ties, coffee, sugar, soap, and case goods generally, from New York, Boston, Philadelphia, Baltimore, and other Eastern cities, by steamboat to (from?) Mobile Ala.; that the shipments at the time he gave his deposition (1894) were very considerable, and were growing larger all the while on account of the great discrepancy in the rate to Mobile, and the low rate by the Alabama River; and that such shipments were made by sailing vessels (Benner Line).

W. F. Vandiver, Trans., p. 289.

In 1894 the question was being agitated by parties with ample capital to establish a line of steamers between Boston and New York to Mobile direct. In 1886, when there was a steamship line between New York and Mobile, the through rate to Montgomery on first-class was 55 cents per 100 against an all-rail rate of $1.14. Should that company be establised and the old rates be re-established, the rail lines would have to largely reduce their

present rates or the business would go to Montgomery entirely by the water route.

W. F. Vandiver, Trans., pp. 293, 294.

It is also a fact that Mobile is fast forging her way to the front as a port of entry for large vessels.

H. M. Hobbie, Trans., p. 299.

XIV.

Shipments from Louisville, St. Louis, Cincinnati and Other Western Points to Montgomery, via Mobile and the Alabama River.

A merchant at Montgomery states that several years ago, when there was such a great difference in the rates of freight between Montgomery and Mobile, the merchants of Montgomery put two steamers on the Alabama River, and ran them between Montgomery and Mobile. His house shipped a large amount of goods from the West via Mobile, and upon said boats to Montgomery. Said shipments consisted of flour, grain, oats, corn, flasks, whiskies, and a great many articles of merchandise. Said shipments comprised many car loads, and came by nearly every boat. They came from Peoria, Ill., Cincinnati, Chicago, Louisville, and points in Indiana.

Jacob Greil, Trans., pp. 281, 282, 283.

A manager of steamboats at Montgomery states that he has received upon his boats at Mobile, and brought by river to Montgomery, shipments from points west of Mobile; that said shipments have been made every trip that his boats make, more or less; such trips being made once a week.

T. H. Moore, Trans., p. 220.

Said shipments came from Louisville, Cincinnati, St. Louis, Chicago, and all points in the West. They consisted of staves, beer in casks, empty bottles, nails, grain, flour, meal, Western produce, and other articles.

T. H. Moore, Trans., p. 222.

A wholesale grocer at Montgomery states that he has received shipments by river at Montgomery, which came via Mobile, from points west of Mobile. They consisted of large quantities of sugar, molasses, canned goods, etc., received from New Orleans.

One of them consisted of fifty hogsheads of sugar, shipped by water from New Orleans to Mobile and up the river to Montgomery, saving a considerable difference in freight as compared with the all-rail route, even after paying the insurance. At various times, in comparatively late years, he has received large shipments of grain, flour, lard and other western produce from Cincinnati, St. Louis and Louisville, and other points in the West; all of which came via Mobile, and thence to Montgomery by river.

H. M. Hobbie, Trans., pp. 296, 297.

Another wholesale grocer at Montgomery, states that every year since he has been in business, he has received more or less freight from New Orleans and Western points, such as St. Louis, Louisville, Chicago, Milwaukee, and Missouri River points, by steamers on the Alabama River. The shipments from New Orleans consisted of sugar, molasses and other articles, bought in New Orleans. From the West he has within the last comparatively few years received a great deal of flour, grain, and other Western produce. On one occasion several years ago he bought (brought) a thousand barrels of flour by the way of Mobile, in one shipment. It has not been uncommon to receive several car loads of sugar from New Orleans, on account of the rate to Mobile, plus the low rate to Montgomery by the Alabama River. The movement by Mobile and river to Montgomery is more or less continuous.

W. F. Vandiver, Trans., pp. 288, 289, 291.

XV.

Shipments of Cotton from Montgomery by River to Mobile for Export.

During the cotton season of 1893, on account of an increase in rates by rail to Atlantic ports on cotton, a large amount of cotton was shipped from Montgomery to Mobile by river for export.

J. H. Clisby, Trans., p. 305.

A line of Liverpool steamers has already been established to transport cotton and other commodities from Mobile to European cities. One line of steamers (steamboats) is offering to transport cotton from Montgomery to Mobile at 65 cents per bale,

including insurance. This is a saving of about 85 cents per bale as compared with the rail route.

H. M. Hobbie, Trans., pp. 299, 300.

XVI.

The Effect of Increasing the Rail Rates on Class Goods from New York, Baltimore, and Other Northeastern Points, to Montgomery, so as to Make Them the Same as the Rates to Troy.

One of the orders made by the Commission directs the defendants to make "on shipments of class goods from New York, Baltimore, or other Northeastern points, to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid."

Trans., p. 69.

The "Sea and Rail" rates, in cents per 100 lbs., from New York are:

Classes.	1	2	3	4	5	6
To Troy	136	117	103	89	74	61
To Montgomery	114	98	86	73	60	49
Difference	22	19	17	16	14	12

Trans., p. 55, left col.

If the object of the Commission was merely to give to Troy the same rates as may obtain to Montgomery, it can be done either by reducing the Troy rates; or by increasing the Montgomery rates by the amount of the above difference. But the effect of such an increase in the rates from New York to Montgomery would be to very greatly increase the shipments of such freight from New York to Mobile by ocean. It would give the boats upon the Alabama River all they would want to do in carrying freight between Mobile and Montgomery; and the river traffic would be largely increased.

T. H. Moore, Trans., p. 221, Ans. No. 9.
M. B. Houghton, Trans., p. 286, Ans. No. 9.
H. M. Hobbie, Trans., p. 297, Ans. No. 8.
W. F. Vandiver, Trans., p. 290, Ans. No. 9.

In case the railroads at any time should increase their rate, a

large proportion of the through business both from the East and West would go to the boats.

Jacob Greil, Trans., p. 285.
M. B. Houghton, Trans., p. 288.
W. F. Vandiver, Trans., p. 293.

In 1886, there was a steamship line between New York and Mobile, and the rate through to Montgomery on first-class was 55 cents per 100 lbs. against an all-rail rate of $1.14.

The question is now being agitated by parties with ample capital to establish a line of steamers between Boston, New York and Mobile direct.

If that line should be established and the old rate re-established, the rail lines would have to largely reduce their present rates or the business would go to Montgomery entirely by the water route.

W. F. Vandiver, Trans., pp. 293, 294.

XVII.

The Effect of Increasing the Rail Rates, on Class Goods, from Louisville, St. Louis, and Cincinnati, to Montgomery, so as to Make Them the Same as the Rates to Troy.

The rates, in cents per 100 lbs., from Louisville, Cincinnati and St. Louis, are higher to Troy than to Montgomery, by the following figures, viz.:

Class.....	1	2	3	4	5	6	A	B	C	D	E	H	F
	42	38	35	32	23½	21	17	19	13	12	21	26	26

Trans., p. 51, right col.

If a mere equality of rates as between Troy and Montgomery is all that is deemed important, it can be obtained either by reducing the Troy rates; or by increasing the Montgomery rates by the above figures. But the result of such an increase in the rates from Louisville, St. Louis and Cincinnati to Montgomery would be that all business for Montgomery would go to Mobile by rail or water, and come up the river to Montgomery on the boats now on the river.

T. H. Moore, Trans., p. 221, Ans. No. 10.

The immediate effect would be the movement of immense quantities of freight to Mobile, thence by the Alabama River to Montgomery. And the ultimate result would be simply to transfer the entire business, practically, via the Ohio and Mississippi Rivers to New Orleans, thence to Mobile, and up the Alabama River, and distribute it through the Montgomery section.

W. F. Vandiver, Trans., p. 290, Ans. No. 10.
M. B. Houghton, Trans., p. 286, Ans. No. 10.
Jacob Greil, Trans., p. 282, Ans. No. 10.
H. M. Hobbie, Trans., p. 297, Ans. No. 9.

The Commission did not order the Troy rates to be reduced to the Montgomery rates; but it did order them to be reduced to the Columbus and Eufaula rates.

Trans., p. 69.

The rates, in cents per 100 lbs., from Louisville are higher to Troy, than to Columbus and Eufaula, by the following figures, viz.:

Class.....	1	2	3	4	5	6	A	B	C	D	E	H	F
	33	38	32	27	19½	16	17	14	8	7	19	4	16

Trans., p. 65, left col.

XVIII.

The Effect of Increasing the Rail Rate from Montgomery to Atlantic Seaports on Cotton for Export.

The Commission states that on two shipments of cotton to Savannah for export, made the same day, the one from Montgomery (the longer distance point both over the Alabama Midland and the Georgia Central) and the other from Troy, the rate charged the Troy shipper is 45 cents and that charged the Montgomery shipper is only 32 cents. In other words, the Troy rate is 13 cents higher than the Montgomery rate.

Trans., p. 58, right col.

One of the orders made by the Commission, directs the defendants to make on "shipments of cotton from Troy aforesaid, for export through the Atlantic seaports, to wit: Brunswick, Savannah, Charleston, West Point, or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid."

Trans., p. 69.

If the object of the Commission was merely to give to Troy the same rate on export cotton as may obtain from Montgomery to the Atlantic seaports, it can be done either by reducing the Troy rate, or by increasing the Montgomery rate 13 cents per 100 lbs. But the effect of such an increase in the rail rate from Montgomery would be very decided towards inducing shipments of such cotton from Montgomery to Mobile by river, and thence by vessel from Mobile to European points, and there would be no difficulty in getting vessels to come into Mobile to get such cotton. The capacity of the river for such shipments would be from 15,000 to 20,000 bales per month; and it could be increased by the barge system to 30,000 or 40,000 bales per month. All cotton received at Montgomery could be shipped to Mobile by river, and that would be the effect of such an increase.

T. H. Moore, Trans., p. 221, Ans. No. 11.
M. B. Houghton, Trans., p. 286, Ans. No. 11.
W. F. Vandiver, Trans., p. 290, Ans. No. 11.
J. H. Clisby, Trans., p. 304, Ans. No. 11.

The advance of 13 cents per 100 lbs. on the Montgomery rate to Atlantic ports on cotton for export, would necesitate an advance of a like amount to the gulf ports, say New Orleans. And in the event of such an advance it would drive the business to the Alabama River via Mobile, and thence by rail to New Orleans. The ultimate result would be the establishment of a line of steamers direct from Montgomery to New Orleans, carrying cotton during the cotton season to New Orleans, and bringing back in return large quantities of western produce which would be distributed through the Montgomery section.

W. F. Vandiver, Trans., p. 291, Ans. No. 16.

XIX.

The Chattahoochee River—Period of Navigation.

The Chattahoochee River is navigable by steamboats between Eufaula and Apalachicola every month in the year.

J. G. Guice, Trans., p. 334.
Geo. C. McCormick, Trans., p. 339.
R. Q. Edmonson, Trans., p. 347.
Geo. H. Dent, Trans., p. 343.
A. Berringer, Trans., p. 325.
J. W. Tullis, Trans., pp. 308, 309.

It is also navigable for steamboats between Columbus and Apalachicola all the year.

W. R. Moore, Trans., p. 318.

XX.

THE CHATTAHOOCHEE RIVER—NUMBER OF STEAMBOATS.

There are four or five steamboats which run on the Chattahoochee River between Columbus, Eufaula and Apalachicola; but only three of them make regular trips.

John O. Martin, Trans., p. 312.

R. Q. Edmonson, Trans., p. 347.

The three steamboats now running between Columbus, Eufaula and Apalachicola are as follows, viz.: The "Flint," 125 to 150 tons; the "Naid," 130 to 150 tons; the "Bay City," 100 to 130 tons.

W. R. Moore, Trans., p. 317.

J. Joseph, Trans., pp. 321, 322.

Geo. H. Dent, Trans., p. 343.

One of the boat lines on the Chattahoochee River, towit, the Peoples Line, is owned and controlled by the Plant System. This is the only line owned or controlled by the railroads.

The other boats are not owned by any railroad company; they do business with the railroads touching the river, but they are under a different management. The railroads referred to are as follows: The Central Railroad, the Georgia Midland & Gulf R. R., the Columbus Southern R. R., the Savannah, Americus & Montgomery Ry., the Alabama Midland Ry., the Pensacola & Atlantic R. R. (generally known as the Louisville & Nashville R. R.), and the Savannah, Florida & Western R. R.

The only connection between said railroads and said last mentioned boats is that of connecting carriers.

J. Joseph, Trans., p. 324.

W. R. Moore, Trans., p. 320.

It requires about three days to go from Columbus to Apalachicola; and about two and a half days to go from Eufaula to Apalachicola.

J. Joseph, Trans., p. 324.

The average time required for a boat to go from Columbus to Apalachicola and return is about five or six days in ordinarily high water, and in low water it takes seven days or more.

J. Joseph, Trans , p. 322.
W. R. Moore, Trans., p. 317.

The time required for a boat to go from Eufaula to Apalachicola and return is from three to five days.

J. G. Guice, Trans., p. 334.
W. R. Moore, Trans., p. 317.
J. W. Tullis, Trans., p. 308.
R. Q. Edmonson, Trans., p. 347.
Geo. H. Dent, Trans., p. 343.

Boats run from Eufaula to Apalachicola about three times a week, and arrive at Eufaula from Apalachicola about three times a week.

Geo. H. Dent, Trans., p. 346.
John O. Martin, Trans., p. 315.
R. Q. Edmonson, Trans., p. 350.

XXI.

The Effect of the Navigability of the Chattahoochee River Upon Railroad Rates at Columbus, Ga., and Eufaula, Ala.

The fact that the Chattahoochee River is navigable by steamboats has the effect of preventing the railroads from overcharging in their rates between Eufaula, and Mobile, and New Orleans, and New York, and other Northeastern cities.

A. Berringer, Trans., p. 325.

It has a menacing effect upon the railroads centering at Eufaula.

Jno. O. Martin, Trans., p. 312.

The effect is to secure to Eufaula merchants a lower rate of freight by railroad between Eufaula and Mobile, New Orleans, and New York and other eastern cities, than they would otherwise have.

R. Q. Edmonson, Trans., p. 347.
J. W. Tullis, Trans., p. 309.

The effect is to fix the rates charged by railroads between Eufaula and New York, and other Northeastern cities.

Geo. H. Dent, Trans., p. 343.

The water competition actually controls and fixes the rail rates all the time.

J. W. Tullis, Trans., p. 312, Ans. No. 20.

The water advantages of Eufaula, while there is not much business now done by water, enable Eufaula merchants to get better railroad rates than they would otherwise have.

Geo. C. McCormick, Trans., p. 340.

The fact that the Chattahoochee River is navigable by steamboats has the effect of keeping down the rates charged by railroads between Eufaula, and Mobile, and New Orleans, and New York, and other Northeastern cities. In other words, it has the effect of maintaining reasonable rates by rail.

J. G. Guice, Trans., pp. 334, 335.

During the period from about 1875 to 1880 water competition at times actually controlled and fixed rail rates—that is, caused rail rates to be changed to compete with water rates from Eastern markets.

Jno. O. Martin, Trans., p. 317.

A. Berringer, Trans., p. 329.

The rates which are now charged between Eufaula, and Mobile and New Orleans, are higher than they have been at times, and lower than at other times, such rates having fluctuated from time to time on account of rate wars. The cause of these different reductions has been on account of the rate wars on the river, and on account of compromises made between the opposing lines.

J. G. Guice, Trans., p. 335.

The railroads have always adopted the rates of the water route, they having been established prior to the railroads reaching Eufaula.

Jno. O. Martin, Trans., p. 317.

The rates by river and rail are now approximately the same, and Eufaula merchants usually avoid the river route on account of the difficulty in handling and on account of the irresponsibility of the parties who handle the river traffic.

Geo. C. McCormick, Trans., p. 340.

If there were no railroads at Eufaula, it could get all of its

goods by river; and it could ship every bale of cotton or goods by river.

J. W. Tullis, Trans., p. 309.

XXII.

Shipments from New York, Baltimore, and Other Northeastern Points, to Columbus and Eufaula, via Apalachicola, Fla., and the Alabama River.

From 1864 up to 1875, boats on the Chattahoochee River hauled freight from or to Columbus or Eufaula via Apalachicola; which freight came to or from New York, or other Northeastern cities.

W. R. Moore, Trans., p. 330.

From the close of the war up to about 1872, there were frequent and continuous shipments of goods, which came via Apalachicola, and by river to Eufaula, from Boston, New York, Philadelphia, Baltimore, and other Eastern cities. All Eastern shipments came to Eufaula in that way from about 1865 to 1868.

Jno. O. Martin, Trans., p. 312.

They consisted of all manner of general merchandise.

Jno. O. Martin, Trans., p. 314.

The route by river from Apalachicola to Eufaula was the usual route over which shipments from Boston, New York, Philadelphia, Baltimore, and other Eastern cities, came to Eufaula from the close of the war up to about 1867. Since then, and after the railroads were fully reconstructed, the shipments have been principally by rail; but there have been occasional years when, on account of lower rates being furnished by water route, shipments were made principally or largely by said water route.

Jno. O. Martin., Trans., p. 314.

The usual route from New York to Eufala is now by the Ocean Steamship Co. from New York to Savannah, and from Savannah to Eufaula by rail. That route requires about six days.

Geo. C. McCormick, Trans. p. 341.

Shipments made from Boston, New York, Baltimore, and

Philadelphia by water to Savannah, and thence by rail to Eufaula, consume much less time than the usual all-rail route.

Geo. H. Dent, Trans., p. 345.

A shipment from New York, Boston, Philadelphia, and other Northeastern cities to Eufaula by all-water route, by steamer, would require about ten days, and by sailing vessels from two to three weeks, owing to the weather. It would require about a week for shipments from those points to Eufaula, by the usual rail route.

A. Berringer, Trans., p. 327.

Shipments from Boston, New York, Philadelphia, Baltimore and other Northeastern cities, via Apalachicola, by river to Eufaula, would require a transfer of the goods at Apalachicola from the ocean or gulf vessel to the river steamer, and this would involve expense and delay; but this expense and delay is taken into consideration in fixing the through rates.

A. Berringer, Trans., p. 327.

J. G. Guice, Trans., p. 338.

This expense is not as much, or at least not any more, than to transfer from a steamer to a railroad; inasmuch as one steamer runs up close to the other and the freight is discharged directly from one vessel to the other.

J. G. Guice, Trans., p. 337.

Jno. O. Martin, Trans., p. 315.

And on such shipments through bills of lading and rates would be given.

Jno. O. Martin, Trans., p. 315.

XXIII.

Shipments from Louisville, St. Louis, Cincinnati, and Other Western Points, to Columbus, and Eufaula, via Apalachicola, Fla., and the Alabama River.

In former years Western freight went down the Mississippi River to New Orleans, and from there to Apalachicola, and from Apalachicola to Columbus and Eufaula, whereas it now comes direct by rail, and consequently requires much less expense in handling.

W. R. Moore, Trans., p. 318.

In 1864, and the following years up to 1875, steamboats on the Chattahoochee River hauled through freights from or to Columbus or Eufaula via Apalachicola, which freights came to or from Mobile, and New Orleans, and New York, or other Northeastern cities.

W. R. Moore, Trans., p. 320.

Said boats did, practically, all the business which was done between Columbus and Eastern and Western cities.

W. R. Moore, Trans., p. 320.

A dry goods merchant at Eufaula states that prior to the last ten or fifteen years he received shipments of goods at Eufaula which came via Apalachicola from Mobile and New Orleans. He shipped by that route, from New Orleans, molasses and all kinds of groceries, and from Mobile, principally, coffees. He dealt very largely at that time in groceries, and shipments by that route were quite large and frequent. He received shipments by nearly every boat that came to Eufaula; and the value of such shipments amounted, probably, to $20,000 or $30,000 per annum.

A. Berringer, Trans., p. 325.

Said shipments originated at Mobile, New Orleans, and St. Louis.

A. Berringer, Trans., p. 327.

A wharf owner and steamboat agent at Eufaula, states that from 1866 to 1867 he received numerous shipments of goods at Eufaula, which came via Apalachicola, from Mobile and New Orleans. Said shipments were frequent, and consisted of all Western products shipped to Eufaula and adjacent territory, in the years immediately succeeding the war.

John O. Martin, Trans., p. 312.

The route by river from Apalachicola to Eufaula was the usual route over which shipments were made from Mobile and New Orleans during the period from the close of the war up to 1872. Prior to the completion of the Montgomery and Eufaula Railroad all shipments from Mobile and New Orleans came by said water route; and after that road was completed, the rail route was the usual route for the receipt of shipments from said cities, the railroad company having adapted its rates to the water rates.

John O. Martin, Trans., pp. 314, 315

Shipments received by him from Mobile and New Orleans, via Apalachicola, by river, originated at Cincinnati, St. Louis, New Orleans, and Mobile.

John O. Martin, Trans., p. 315.

They consisted of Western products, such as meat, hay, corn, etc.

John O. Martin, Trans., p. 314.

Shipments from Ohio River points, via the Ohio and Mississippi Rivers, to New Orleans, and thence by water to Apalachicola, and thence by river to Eufaula, have to be transferred at New Orleans, from the Mississippi River steamer or vessel to the Gulf steamer or vessel, and at Apalachicola, from the Gulf vessel to the Chattahoochee River steamboat. These transfers would involve some additional expense and delay. But there is no great delay; and the expense is not as much, or at least not any more, than to transfer from a steamer to a railroad; inasmuch as one steamer runs up close to the other, and the freight is discharged directly from one vessel to the other.

J. G. Guice, Trans., p. 337.

As such shipments are made on through bills of lading, the expense of making said transfers would be taken into consideration in making the through rate.

Geo. H. Dent, Trans., p. 345.

John O. Martin, Trans., p. 315.

It would require from eight to twelve days for a shipment to be made from Louisville, Cincinnati, St. Louis, or other Ohio River points, to Eufaula by water; and it would require from five to twelve days for such shipment to be made by rail, or by the usual rail route: this is owing to the crowded state of affairs.

John O. Martin, Trans., p. 315.

A. Berringer, Trans., p. 327.

Or, as stated by another witness, taking into consideration the delays incident to the hauling of freight on railroads, there would be little difference in time. The usual time is about ten or fifteen days by rail, and it would be about the same by water.

J. G. Guice, Trans., p. 337.

XXIV.

Shipments of Cotton from Columbus and Eufaula via Apalachicola, Fla., for Export.

The route from Eufaula to Apalachicola by river, was the only and usual route by which shipments to Mobile and New Orleans were made up to about 1867. After 1867, and up to about 1872 the shipments by that route were considerable. After 1872 the shipments by that route were irregular.

John O. Martin, Trans., p. 316, Ans. No. 14.

From 1866 to 1868 the shipments were frequent and in large quantities.

J. G. Guice, Trans., p. 334.

From 1866 to 1876, frequent shipments of cotton and other goods were made from Eufaula to Apalachicola. Boats were then running three times a week between Eufaula and Apalachicola, and shipments were made by every boat. The shipments were large, as all goods that were shipped from or to Eufaula came by that route.

John O. Martin, Trans., p. 312.
J. W. Tullis, Trans., p. 308.

The route from Eufaula by river to Apalachicola was the usual route for shipments of cotton to Mobile and New Orleans before the railroads were completed. After the construction of the railroads it was the usual route until the railroads furnished rates not greater than the water rates; and after that the shipments have usually been made by rail.

Very little of the cotton shipped from Eufaula to Mobile and New Orleans has gone by water since the Montgomery & Eufaula R. R. was constructed; for the reason that Eufaula shippers have been able since that time to procure the same rate from the railroad that they would have had to pay by the river route.

J. W. Tullis, Trans., p. 310, 311.

Since 1876 little, if any cotton, shipped from Eufaula by river has actually gone to or through Apalachicola. It has been taken up by the railroads (which cross the Chattahoochee River above Apalachicola) before reaching that point.

J. W. Tullis, Trans., p. 308.

A cotton shipper at Eufaula states that about seven or eight years ago he shipped about 2,000 bales of cotton at about one-half the usual rate by rail, because the river offered to take it for that rate. He also states that about four years ago he sent about 10,000 bales of cotton down the river; but before the season was over he stopped that class of shipments down the river, and sent them by railroad, because the railroads made rates satisfactory.

J. W. Tullis, Trans., pp. 312, 311.

Another cotton shipper at Eufaula states that at present he is making no shipments from Eufaula via Apalachicola to Mobile, because the present railroad rates are satisfactory, and the outlets to the seaboard are more convenient for the present volume of his business. But in seasons gone by, and up to as late as 1884, his firm had shipped over 15,000 bales by part river and part rail route; some going via Brunswick, some via Fernandino, some via Savannah, some via Jacksonville, and some via Mobile, Pensacola, and New Orleans. In 1884, he had arranged with a sailing vessel to take about 1,500 bales by Apalachicola; and when the railroads found it out, they gave him a satisfactory rate out through Savannah; and he had the sailing vessel changed from Apalachicola to Savannah, and loaded there.

J. G. Guice, Trans., p. 338.

For the last two or three years the cotton from the Eufaula territory all goes East, either for New England or Northern Canadian spinners, or for export to Europe.

J. W. Tullis, Trans., p. 311.

The distance by river from Columbus to Apalachicola is 360 miles. From Eufaula to Apalachicola the distance is stated to be from 255 miles to 275 miles. The distance from Columbus to River Junction, Fla., and to the town of Chattahoochee, Fla., is about 224 miles. From Eufaula to River Junction and to the town of Chattahoochee the distance is about 139 miles.

J. Joseph, Trans., p. 323.

W. R. Moore, Trans., p. 319.

From River Junction, the Louisville & Nashville Railroad runs westwardly to Pensacola, Mobile, and New Orleans; and from the town of Chattahoochee, Fla. (which is just across the river from River Junction), the Savannah, Florida & Western Railroad runs eastwardly to Jacksonville and Savannah, with connections to Brunswick, Fernandino, and Charleston; and the

Florida Central & Peninsula Railroad runs eastwardly to Jacksonville, Fernandino, and Savannah, with connections to Brunswick and Charleston.

Through bills of lading on shipments of cotton from Eufaula, by river, via Apalachicola, to Mobile or New Orleans can be obtained; and such bills of lading can be negotiated in bank.

J. W. Tullis, Trans., p. 311.

Through bills of lading can also be obtained, and negotiated in bank, on shipments of cotton from Eufaula, by river, via Apalachicola, to foreign ports.

J. G. Guice, Trans , p. 338.

R. Q. Edmonson, Trans., p. 350.

XXV.

The Harbor at Apalachicola, Fla.

Though Apalachicola Harbor is now used principally for lumber, it was formerly the second or third port in the United States for cotton; and large quantities of cotton have been shipped out of there since the war.

J. G. Guice, Trans., p. 338.

Most of the cotton along the Chattahoochee, Chipola, Flint, and Apalachicola Rivers, and the country tributary thereto, was, during the years 1865, 1866, and 1867, brought to the town of Apalachicola by river steamers and carried out by sea-going vessels. It amounted to about 100,000 bales a year. A large amount of freight was brought into Apalachicola during those years; and such of it as was destined for interior points along the rivers, was carried by river steamers. From 1880 to 1993, inclusive, about 150 vessels came to the port of Apalachicola, annually; the exact number cannot be ascertained as many vessels are not required to report to the Custom House their arrival and departure.

J. E. Grady, Trans., p. 396.

Steamers and sail vessels are now plying between Apalachicola, Fla., and Mobile, Ala.

J. E. Grady, Trans., p. 396.

Sail vessels, and occasionally a steamer, call at Apalachicola

for lumber and timber bound for Northeastern cities; and they very often bring merchandise for Apalachicola, but none for interior points.

J. E. Grady, Trans., p. 396.

Steam and sail vessels, drawing 18½ feet of water can enter the bay of Apalachicola, through the east pass, a distance of fifteen or twenty miles from the city. Vessels drawing 12 feet of water can enter the bay of Apalachicola, through the west pass, and anchor within four miles of the city. The distance from the city of Apalachicola to the different anchorages in the bay is from four to twenty miles. A barge towed by a steam tug can make the trip in from one to four hours. Some vessels bring goods from, and carry goods to Mobile and New Orleans; others bring and carry merchandise, such as lumber and general merchandise from, and to Northeastern cities, such as New York, Boston, etc. Goods destined to Mobile, New Orleans, or Northeastern cities, from Columbus and Eufaula, would be brought to Apalachicola by river steamers and transferred to the vessels in the bay by barges towed by tugs, or by lighters.

Shipments from Mobile and New Orleans, generally brought by vessels of light draft, can be transferred alongside the river steamers at Apalachicola.

J. E. Grady, Trans., pp. 395, 396.

Galveston steamers will stop at Apalachicola and take cotton for shipment to the North and East.

J. W. Tullis, Trans., p. 311.

Shippers at Eufaula have received propositions to put on steamers into Apalachicola to take their cotton and freight to any water points in the United States, or Europe, whenever they deem it necessary and can furnish freight sufficient to load the steamers.

J. G. Guice, Trans., pp. 337, 338.

XXVI.

The Effect of Increasing the Rail Rates on Class Goods from Louisville, St. Louis, and Cincinnati, to Columbus and Eufaula, so as to Make Them the Same as Rates to Troy.

One of the orders made by the Commission enjoins the defendants to charge on "Class goods shipped from Louisville, Ky., St. Louis, Mo., or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Ga., and Eufaula, Ala."

Trans., p. 69.

The present rates from Louisville to Troy are higher than the rates from Louisville to Columbus and Eufaula, by the following figures:

Classes.....	1	2	3	4	5	6	A	B	C	D	E	H	F
	33	38	32	27	19½	16	17	14	8	7	19	4	16

Trans., p. 65, left col.

If a mere equality of rates as between Troy, Columbus, and Eufaula, is the object aimed at by the Commission, it can be attained either by reducing the Troy rates, or by increasing the Columbus or Eufaula rates, by the above figures. But the effect of such an increase in the Columbus and Eufaula rates would be that shipments of freight would be made by boat upon the Ohio and Mississippi Rivers from Louisville, Cincinnati, and St. Louis, to New Orleans, thence by vessel to Apalachicola and by steamboat to Eufaula. And if the present line of boats on the Chattahoochee River should not be sufficient, or would not accept rates for carrying freights with the other water lines, other boats would at once be put upon the river.

Jno. O. Martin, Trans., p. 313.
R. Q. Edmonson, Trans., pp. 347, 348.
Geo. H. Dent, Trans., p. 344.
W. R. Moore, Trans., p. 318.
J. G. Guice, Trans., p. 335.

XXVII.

The Effect of Increasing the Rail Rates from Columbus and Eufaula, to New Orleans, on Cotton for Export.

One order of the Commission enjoins the defendants to charge "on shipments of cotton from Troy aforesaid, through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cents per 100 lbs."

Trans., p. 69.

The present rate on cotton from Troy to New Orleans is 68 cents per 100 lbs.

Trans., p. 59, right col.

The present rate on cotton from Columbus to New Orleans is 50 cents per 100 lbs.; and as Columbus is forty-two miles further than Troy from New Orleans, the Commission ordered that the through rate on cotton from Troy via Montgomery to New Orleans should not exceed 50 cents per 100 lbs.

Trans., p. 61, left col.

If a mere equality of rates as between Troy and Columbus to New Orleans is the object aimed at by the Commission, it can be attained either by reducing the Troy rate; or by increasing the Columbus rate from 50 cents to 68 cents per 100 lbs. This would involve an increase in the Columbus rate of 18 cents per 100 lbs.

But if the rail rates on cotton from Columbus and Eufaula to New Orleans should be increased 18 cents per 100 lbs. it would have the tendency to again open up the shipment of cotton by river to Apalachicola, and thence by vessel to New Orleans, and Eastern points.

W. R. Moore, Trans., p. 318, Ans. No. 9.

It would force shippers to ship cotton and other freights by river to Apalachicola, and thence by vessel to New Orleans.

A. Berringer, Trans., p. 326.

The effect would be the establishment of boat lines in opposi-

tion to the railroads for shipping cotton and other freight by Apalachicola to New Orleans by water.

J. G. Guice, Trans., p. 325.
Jno. O. Martin, Trans., p. 313.
Geo. H. Dent, Trans., p. 344.
J. W. Tullis, Trans., p. 309.

XXVIII.

The Effect Upon the Revenue of the Alabama Midland Railway of the Reduction in Rates Ordered by the Commission on Class Goods from New York, Baltimore, and Other Northeastern Points, to Troy.

The Commission ordered that on shipments of class goods from New York, Baltimore or other Northeastern points, the rates charged by the Alabama Midland Railway and its connections shall not be higher than the rates to Montgomery.

Trans., p. 69.

The "sea and rail" rates from New York to Troy and Montgomery, respectively, are as follows:

Classes	1	2	3	4	5	6
To Troy	136	117	103	89	74	61
To Montgomery	114	98	86	73	60	49
Difference	22	19	17	16	14	12

The above "difference" shows the amount of reduction ordered by the Commission upon each of the six classes of goods.

See Trans., p. 55, left col.

The complaint of the Board of Trade of Troy was filed before the Commission on June 29, 1892; and the case was decided by the Commission August 15, 1893.

Trans., p. 52.

For the fiscal year, July, 1892, to June, 1893, inclusive, the gross earnings of the Alabama Midland Ry. Co. were $490,767.77.

The operating expenses during that period were $568,362.34; deficit, $77,564.57.

McLendon, Trans., p. 352.

The road was operated skillfully, economically and honestly; and all ordinary methods usually pursued by railroads in the procurement of a just and fair proportion of competitive traffic were employed by the officials of that road.

McLendon, Trans., p. 352.

The revenue derived by the Alabama Midland Ry. during the fiscal year July, 1892, to June, 1893, inclusive, from traffic from the East destined to local stations on that road, including Troy, etc., where the rates from the East to those stations were higher than the rates from the East to Montgomery, amounted to $35,-511.73.

If the Alabama Midland Ry. Co. had been compelled to accept from the East to those local stations, the proportions of through rates which it accepted from the East to Montgomery, it would have realized only $28,062.91. In other words, if the order that was made by the Commission in this case reducing the rates from the East to Troy had been enforced, it would have reduced the revenue of the Alabama Midland Railway on traffic from the East alone $7,448.82, for the year July, 1892, to June, 1893, inclusive.

McLendon, Trans., p. 352.

XXIX.

Competitive Lines from New York, Baltimore, and Other Northeastern Points, to Montgomery.

The Commission reports the following through lines over which traffic is carried on through rates and through bills of lading, viz.:

1. Alabama Midland Ry., Montgomery to Bainbridge; Savannah, Florida & Western Railway, Bainbridge to Savannah; Ocean Steamship Co., Savannah to New York.

Trans., p. 55, left col.

2. Alabama Midland Railway, Montgomery to Bainbridge; Savannah, Florida & Western Railway, Bainbridge to Savannah; Merchants & Miners Transportation Co., Savannah to Baltimore.

Trans., p. 55, left col.

3. Georgia Central Railroad, Montgomery to Savannah; Ocean Steamship Co., Savannah to New York.

Trans., p. 55, left col.

4. Georgia Central Railroad, Montgomery to Savannah; Merchants and Miners Transportation Co., Savannah to Baltimore.

Trans., p. 55, left col.

5. Western Railway of Alabama, (and Atlanta & West Point Railroad), Montgomery to Atlanta; East Tennessee, Virginia & Georgia Railroad, Atlanta to Bristol; Norfolk & Western Railroad, Bristol to Hagerstown; Cumberland Valley Railroad, Hagerstown to Harrisburg; Pennsylvania Railroad, Harrisburg to New York.

Trans., p. 55, left and right col.

6. Louisville & Nashville Railroad, Montgomery to Birmingham; Alabama Great Southern Railroad, Birmingham to Chattanooga; East Tennessee, Virginia & Georgia Railroad, Chattanooga to Bristol; and thence over the Norfolk & Western Railroad and connections, from Bristol to New York, as in No. 5.

Trans., p. 55, right col.

7. Louisville & Nashville Railroad, Montgomery to Calera; East Tennessee, Virginia & Georgia Railroad, Calera to Bristol; and thence over the Norfolk & Western Railroad and connections, from Bristol to New York, as in No. 5.

Trans., p. 55, right col.

8. Georgia Central R. R., Montgomery, via Columbus and Macon, to Chattanooga; East Tennessee, Virginia & Georgia R. R., Chattanooga to Bristol; thence over the Norfolk & Western R. R., and connections, from Bristol to New York, as in No. 5.

Trans., p. 55, right col.

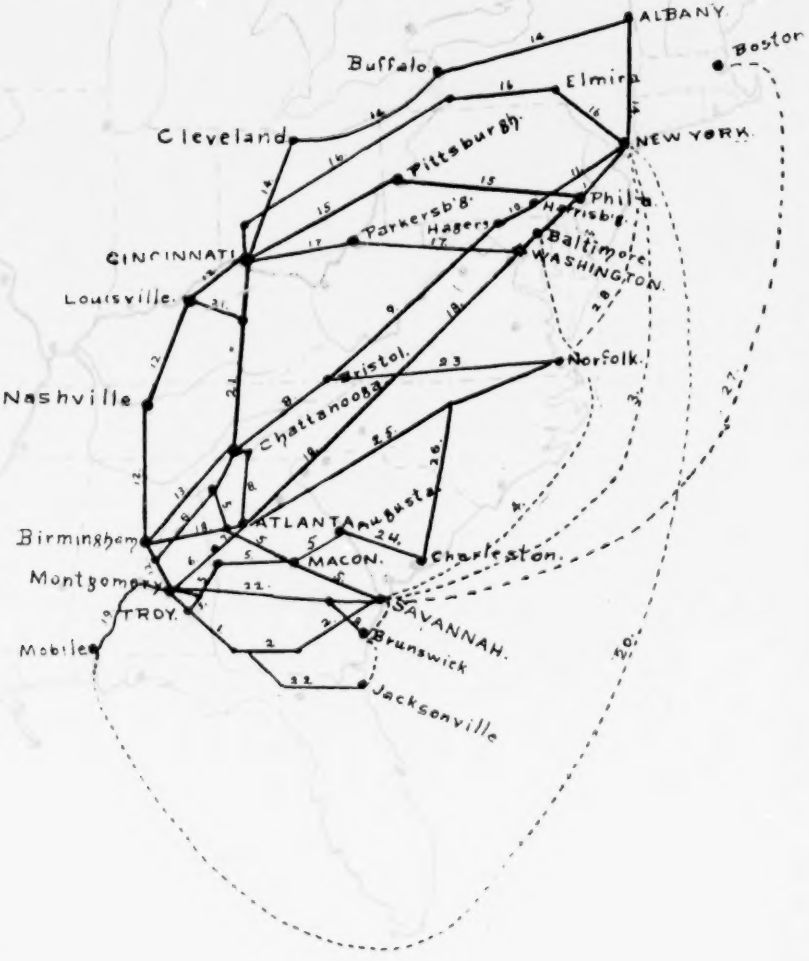
In addition to the above lines mentioned by the Commission in its report, the following lines actually compete for the same traffic:

9. The several lines from Cincinnati and Louisville, to Montgomery, in connection with lines running to Cincinnati and Louisville, from Boston, New York, Philadelphia, Baltimore, and other Eastern points; such as the Boston & Albany R. R.,

INDEX TO DIAGRAM NO. 1.

1. Alabama Midland Ry.
2. Savannah, Florida & Western Ry.
3. Ocean Steamship Line.
4. Merchants' & Miners' Line.
5. Georgia Central Railroad.
6. Western Railway of Alabama.
7. Atlanta & West Point Railway.
8. East Tennessee, Virginia & Georgia Ry.
9. Norfolk & Western Railroad.
10. Cumberland Valley Railroad.
11. Pennsylvania Railroad.
12. Louisville & Nashville Railroad.
13. Alabama Great Southern Railroad.
14. New York Central Railroad.
15. Pennsylvania Railroad.
16. Erie Railroad.
17. Baltimore & Ohio Railroad.
18. Southern Railway.
19. Alabama River.
20. Sail and Steamship Lines.
21. Cincinnati, New Orleans & Texas Pacific Ry.
22. Savannah, Americus & Montgomery Ry.
23. Florida Central & Peninsula R. R.
24. Virginia & Tennessee Air Line.
25. South Carolina Railway.
26. Seaboard Air Line.
27. Atlantic Coast Line.
28. Clyde S. S. Line.
29. Old Dominion S. S. Line.

DIAGRAM No. 1.


ALBANY
Boston
Buffalo
Elmira
Cleveland
NEW YORK
Pittsburgh
Phila
Harrisb'g
Parkersb'g
Hagers
Baltimore
WASHINGTON
CINCINNATI
Louisville
Bristol
Norfolk
Nashville
Chattanooga
ATLANTA
Augusta
Birmingham
MACON
Charleston
Montgomery
TROY
SAVANNAH
Mobile
Brunswick
Jacksonville

New York Central R. R., Erie R. R., Pennsylvania R. R., and Baltimore & Ohio R. R.

Theo. Welsh, Trans., pp. 275, 276, Ans. No. 9.

10. The Western Railway of Alabama, and the Atlanta & West Point R. R., Montgomery to Atlanta; the Piedmont Air Line, now known as the Southern Ry., Atlanta to Washington.

Theo. Welsh, Trans., p. 276, Ans. No. 9.

11. Louisville & Nashville R. R., Montgomery to Calera, and Birmingham; Piedmont Air Line from Calera and Birmingham to Washington.

Theo. Welsh, Trans., p. 276, Ans. No. 9.

12. The Virginia, Tennessee & Georgia Air Line, via Norfolk, by water, and connecting railroads to Montgomery.

Theo. Welsh, Trans., p. 276, Ans. No. 9.

13. Various steamship lines to Charleston, Savannah, Brunswick and Jacksonville, and connecting railroads from those ports to Montgomery.

Theo. Welsh, Trans., p. 276, Ans. No. 9.

Diagram No. 1 sufficiently illustrates the competitive lines described above in this section:

14. And, in addition to the above, is the Alabama River, Montgomery to Mobile; steamers and sail vessels, Mobile to New York, etc.

XXX.

COMPETITIVE LINES FROM MONTGOMERY TO WEST POINT, VA., NORFOLK, CHARLESTON, SAVANNAH, AND BRUNSWICK.

The Commission reports the following roads as constituting through routes or lines:

1. The Alabama Midland Railway, Montgomery to Bainbridge; Savannah, Florida & Western Railway, Bainbridge to Waycross; Brunswick & Western Railway, Waycross to Brusnwick.
Trans., p. 56, left col.

2. The Alabama Midland Railway, Montgomery to Bainbridge; the Savannah, Florida & Western Railway, Bainbridge to Savannah; Charleston & Savannah Railway, Savannah to Charleston.
Trans., p. 56, left col.

3. The Western Railway of Alabama, and the Atlanta & West Point Railroad, Montgomery to Atlanta; the Richmond & Danville Railroad, Atlanta to West Point, Va.
Trans., p. 56, left col.

4. The Alabama Midland Railway, Montgomery to Bainbridge; the Savannah, Florida & Western Railway, Bainbridge to Savannah; the Charleston & Savannah Railway, Savannah to Charleston; the Northeastern Railroad of South Carolina, the Wilmington, Columbia & Augusta Railroad, the Wilmington & Weldon Railroad, the Petersburg Railroad, the Richmond & Petersburg Railroad, and the Richmond & Danville Railroad, Charleston to West Point, Va.
Trans., p. 56, left col.

5. The Alabama Midland Railway, Montgomery to Bainbridge; the Savannah, Florida & Western Railway, Bainbridge to Savannah; the Charleston & Savannah Railway, Savannah to Charleston; the Northeastern Railroad of South Carolina, the Wilmington & Weldon Railroad, and the Seaboard & Roanoke Railroad, Charleston to Norfolk.
Trans., p. 56, left col.

DIAGRAM No 2.


Richmond
West Pt
NORFOLK.
Danville.
ATLANTA
Augusta.
Florence
CHARLESTON
MONTGOMERY
Macon
Pt. Royal.
TROY.
SAVANNAH
Brunswick.
Live Oak.
OCALA.
TAMPA

INDEX TO DIAGRAM NO. 2.

1. Alabama Midland Railway.
2. Savannah, Florida & Western Railway.
3. Brunswick & Western Railroad.
4. Charleston & Savannah Railway.
5. Western Railway of Alabama.
6. Atlanta & West Point Railway.
7. Richmond & Danville Railroad.
8. Northeastern R. R. of South Carolina.
9. Wilmington, Columbia & Augusta R. R.
10. Wilmington & Weldon Railroad.
11. Richmond & Petersburg Railroad.
12. Seaboard & Roanoke Railroad.
13. Georgia Central Railroad.
14. East Tennessee, Virginia & Georgia Ry.
15. Georgia Railroad.
16. South Carolina Railroad.
17. Seaboard Air Line.
18. Port Royal & Augusta Railroad.
19. Plant System in Florida. (To Phosphate Beds).
20. Savannah, Americus & Montgomery Ry.

6. Georgia Central Railroad, Montgomery to Macon; the East Tennessee, Viginia & Georgia Railway, Macon to Brunswick.
Trans., p. 56, left col.

7. Georgia Central Railroad, Montgomery to Savannah; Charleston & Savannah Railway, Savannah to Charleston.
Trans., p. 56, left col.

8. Georgia Central Railroad, Montgomery to Macon; Georgia Railroad, Macon to Augusta; South Carolina Railroad, Augusta to Charleston.
Trans., p. 56, left col.

9. Georgia Central Railroad, Montgomery to Atlanta; the Richmond & Danville Railroad, Atlanta to West Point, Va.
Trans., p. 56, left col.

10. The Georgia Central Railroad, Montgomery to Savannah; the Charleston & Savannah Railway, Savannah to Charleston; and the roads composing the Atlantic Coast Line, and the Richmond & Danville Railroad, Charleston to West Point, Va.
Trans., p. 56, left col.

11. The Georgia Central Railroad, Montgomery to Savannah; Charleston & Savannah Railway, Savannah to Charleston; and the Atlantic Coast Line, Charleston to Norfolk.
Trans., p. 56, left col.

12. The Georgia Central Railroad, Montgomery to Atlanta; Seaboard Air Line, Atlanta to Norfolk.
Trans., p. 56, left col.

The competitive lines described above in this section are sufficiently illustrated in diagram No. 2:

XXXI.

Competitive Lines from the Phosphate Beds in South Carolina and Florida to Montgomery.

The Commission reports that shipments of phosphate rock are made via the following lines:

1. The Alabama Midland Railway, Montgomery to Bainbridge; the Savannah, Florida & Western Railway, Bainbridge to Savannah; the Charleston & Savannah Railway, Savannah to Charleston.

Trans., p. 55, right col.

2. The Alabama Midland Railway, Montgomery to Bainbridge; the Savannah, Florida & Western Railway, Bainbridge to Savannah; the Charleston & Savannah Railway, Savannah to Yemassee; the Port Royal & Augusta Railroad, Yemassee to Port Royal.

Trans., p. 55, right col.

3. The Alabama Midland Railway, Montgomery to Bainbridge; the Savannah, Florida & Western Railway, Bainbridge to Gainesville, Fla.

Trans., p. 55, right col.

4. The Georgia Central Railroad, Montgomery to Port Royal.

Trans., p. 55, right col.

5. The Georgia Central Railroad, Montgomery to Savannah; the Charleston & Savannah Railway, Savannah to Yemassee; the Port Royal & Augusta Railway, Yemassee to Port Royal.

Trans., p. 55, right col.

6. The Georgia Central Railroad, Montgomery to Savannah; the Charleston & Savannah Railway, Savannah to Charleston.

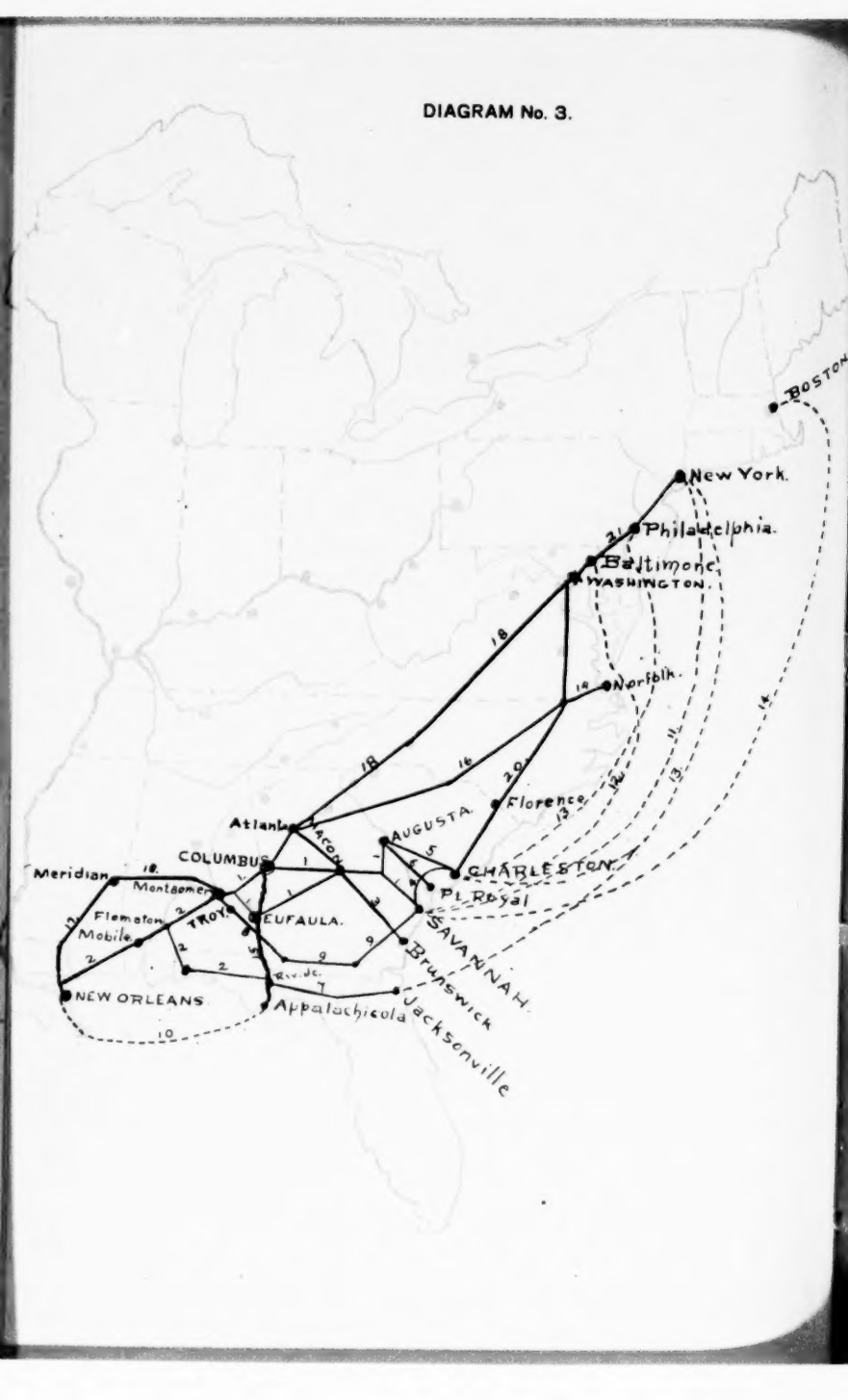
Trans., p. 55, right col.

7. The Georgia Central Railroad, Montgomery to Macon; the Georgia Railroad, Macon to Augusta; the South Carolina Railroad, Augusta to Charleston.

Trans., p. 55, right col.; p. 56, left col.

The competitive lines described above in this section are sufficiently illustrated in said diagram No. 2.

DIAGRAM No. 3.


BOSTON
New York.
Philadelphia.
Baltimore
WASHINGTON.
Norfolk.
Florence.
AUGUSTA.
Atlanta
MACON
COLUMBUS
CHARLESTON.
Pt. Royal
SAVANNAH
Brunswick
Jacksonville
Appalachicola
NEW ORLEANS
Mobile
Flematon
Montgomery
Meridian
TROY
EUFAULA.
Riv. Jc.
18
16
20
14
13
12
11
10
9
8
7
6
5
4
3
2
1

INDEX TO DIAGRAM NO. 3.

1. Central of Georgia Railway.
2. Louisville & Nashville Railroad.
3. East Tennessee, Virginia & Georgia Ry.
4. Charleston & Savannah Railway.
5. South Carolina Railroad.
6. Port Royal & Augusta Railroad.
7. Florida Central & Peninsula R. R.
8. Alabama Midland Railway.
9. Savannah, Florida & Western Railway.
10. Water Route, Appalachicola to New Orleans.
11. Ocean Steamship Route.
12. Merchants' & Miners' S. S. Route.
13. Clyde Steamship Route.
14. Ocean Steamship Route.
15. Chattahoochee River.
16. Seaboard Air Line.
17. Queen & Crescent Line.
18. Southern Railway.
19. Seaboard & Roanoke Railroad.
20. Atlantic Coast Line.
21. Pennsylvania Railroad.

DIAGRAM No 4.


ST. LOUIS.
Evansville.
CINCINNATI.
LOUISVILLE
NASHVILLE
CHATTANOOGA.
MONTGOMERY.
ATLANTA
B'ham
Laudersdale
MACON.
Columbus.
TROY.
MOBILE.
RLEANS.

INDEX TO DIAGRAM NO. 4.

1. Alabama Midland Railway.
2. Georgia Central Railroad.
3. Louisville & Nashville Railroad.
4. Western Railway of Alabama.
5. Atlanta & West Point Railway.
6. Western & Atlantic Railroad.
7. East Tennessee, Virginia & Georgia Ry.
8. Cincinnati, New Orleans & Tex. Pac. Ry.
9. Mobile & Ohio Railroad.
10. Nashville, Chattanooga & St. Louis Ry.
11. Missouri Pacific Railway.
12. Mississippi River.
13. Ohio River.
14. Alabama River.
15. Sail and Steamer Route.

XXXII.

COMPETITIVE LINES FROM LOUISVILLE, ST. LOUIS, AND CINCINNATI, TO MONTGOMERY.

The Commission reports that the most available routes or lines are the following:

1. The Louisville & Nashville Railroad, Montgomery to Louisville, Cincinnati, and St. Louis.

Trans., p. 56, right col.

2. Western Railway of Alabama, and Atlanta & West Point Railroad, Montgomery to Atlanta; the Western & Atlantic Railroad, or the East Tennessee, Virginia & Georgia Railway, Atlanta to Chattanooga; Cincinnati, New Orleans & Texas Pacific Railway, in connection with the Louisville Southern Railroad, Chattanooga to Cincinnati, and to Louisville.

Trans., p. 56, right col.

3. Western Railway of Alabama, Montgomery to Selma; East Tennessee, Virginia & Georgia Railway, Selma to Lauderdale; Mobile & Ohio Railroad, Lauderdale to St. Louis.

Trans., p. 56, right col.

4. The Georgia Central Railroad, Montgomery, via Columbus, to Chattanooga; Cincinnati, New Orleans & Texas Pacific Railway, in connection with the Louisville Southern Railroad, Chattanooga to Cincinnati, and to Louisville.

Trans., p. 56, right col.

5. The Georgia Central Railroad, Montgomery, via Columbus, to Chattanooga; Nashville, Chattanooga & St. Louis Railway, Chattanooga to Hickman; and the Missouri Pacific Railway, Hickman to St. Louis.

Trans., p. 56, right col.

The competitive lines, as described above in this section, are sufficiently illustrated in diagrams Nos. 3 and 4.

And in addition to the above is—

6. The Alabama River to Mobile; the Louisville & Nashville Railroad, or steamers, or sail vessels, Mobile to New Orleans; the Mississippi and Ohio Rivers from New Orleans to St. Louis, Louisville, and Cincinnati.

XXXIII.

Competitive Lines from Montgomery to New Orleans.

The following competitive lines run from Montgomery to New Orleans:

1. The Louisvile & Nashville Railroad, Montgomery, via Mobile, to New Orleans.

2. The Alabama River, Montgomery to Mobile; Louisville & Nashville Railroad, Mobile to Montgomery.

3. Alabama River to Mobile; steamers and sail vessels, Mobile to New Orleans.

4. The Western Railway of Alabama, Montgomery to Selma; East Tennessee, Virginia & Georgia Railway, Selma to Lauderdale; Mobile & Ohio Railroad, Lauderdale to Mobile.

5. The Western Railway of Alabama, Montgomery to Selma; East Tennessee, Virginia & Georgia Railway, Selma to Meridian; Queen & Crescent Railroad, Meridian to New Orleans.

6. Western Railway of Alabama, Montgomery to Selma; Mobile & Birmingham Railroad, Selma to Mobile; Louisville & Nashville Railroad, or steamers, or sailing vessels, Mobile to New Orleans.

7. The Western Railway of Alabama, Montgomery to Selma; East Tennessee, Virginia & Georgia Railway, Selma to Meridian; Queen & Crescent Railroad, Meridian to Jackson; Illinois Central Railroad, Jackson to New Orleans.

8. Western Railway of Alabama, Montgomery to Selma; East Tennessee, Virginia & Georgia Railway, Selma to Meridian; Queen & Crescent Railroad, Meridian to Vicksburg.

The competitive lines described above in this section are sufficiently illustrated in diagram No. 3.

XXXIV.

ARGUMENT.

THE ORDER OF THE COMMISSION AS TO CLASS GOODS FROM NEW YORK, BALTIMORE, OR OTHER NORTHEASTERN POINTS, TO TROY, AND MONTGOMERY.

On shipments of class goods from New York, Baltimore, or other Northeastern points, carried *through* Troy, to Montgomery, the Commision enjoined the Appellees from charging more to Troy, the shorter distance point, than to Montgomery, the longer distance point.

The Commission did not find that the rates from New York, etc., to Troy are unjust or unreasonable in and of themselves; and, therefore, it did not find that said rates violate the first section of the Act to Regulate Commerce.

The Commission did not find that said rates constitute any unjust discrimination against Troy; and therefore it did not find that they violate the second section of the Act.

The Commission did not find that said rates subject Troy to any undue or unreasonable prejudice or disadvantage; and therefore it did not find that they violate the third section of the Act.

The Commission based said order exclusively upon the ground that said rates violate the "long and short haul" clause of the fourth section, which prohibits charging "any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction."

The Commission held that the burden of proof was upon the appellee carriers to show a substantial dissimilarity of circumstances and conditions as between Troy and Montgomery; and that they had failed to do so.

Trans., pp. 57, 58.

The Appellees relied upon water competition at Montgomery via Alabama River and the ocean, and also upon competition

between the various water and rail lines, and the all-rail lines described above in Section XXIX., as constituting a substantial dissimilarity of circumstances and conditions; but the defense was overruled by the Commission.

So far as said order of the Commission is concerned, the only question of law for this Court to decide is, whether competition of any kind, and if so, of what kind, can be considered as one of the circumstances and conditions referred to in the fourth section of the Act?

I submit that this question was virtually settled by this Court in the "Import" case, and the "Social Circle" case; and the Circuit Court of Appeals, in this case, sustained my construction of the decisions of this Court in these cases.

Trans., p. 415.

XXXV.

THE "IMPORT" CASE, AND THE "SOCIAL CIRCLE" CASE.

In the case of the Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, known as the "Import" case, this Court held: "That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports, *as in the case of the traffic originating within the limits of the United States*, competition *that affects rates* should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freight which would otherwise go by other competitive routes are, or are not, undue or unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodity, are to be considered."

162 U. S., 233, 234, T. & P. Ry. vs. I. C. C.

XXXVI.

In the case of C., N. O. & T. P. Ry. Co. vs. Interstate Commerce Commission, known as the "Social Circle" case, this Court said: "It was within the jurisdiction of the Commission to consider whether the said company, in charging a higher rate for a shorter than a longer distance, over the same line, in the same direction, the shorter being included within the longer dis-

tance, was or was not transporting property, in transit between States, *under substantially similar circumstances and conditions.*

"We do not say that, under no circumstances and conditions, would it be unlawful, when engaged in the transportation of foreign (interstate?) freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal appointed to enforce the provisions of the statute, whether the Commission or *the Court*, to consider whether the existing circumstances and conditions were or were not substantially similar.

"It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. *But the question was one of fact*, peculiarly within the province of the Commission, *whose conclusions have been accepted and approved by the Circuit Court of Appeals*, and we find nothing in the record to make it our duty to draw a different conclusion."

162 U. S., 193, 194, C., N. O. & T. P. Ry. vs. I. C. C.

XXXVII.

There is nothing in the decision in the "Social Circle" case which is at all inconsistent with the proposition announced in the "Import" case, that competition *which affects rates* is among the circumstances and conditions to be considered, as well "*in the case of traffic originating within the limits of the United States*" as in the case of traffic originating in foreign ports. In fact, this Court, in the "Social Circle" case, uses this language: "We do not say that under no circumstances and conditions would it be unlawful, when engaged in the transportation of foreign (interstate?) freight, for a carrier to charge more for a shorter than a longer distance on its own line, *but it is for the tribunal appointed to enforce the provisions of the statute*, whether the Commission or *the Court*, to consider *whether the existing circumstances and conditions were or were not substantially similar.*"

162 U. S., 193, 194, C., N. O. & T. P. Ry. vs. I. C. C.

In other words, I understand the conjoint effect of the two decisions to be this, viz.: Under the "Social Circle" decision, it is for the Commission, *or the Court*, to consider whether the exist-

ing circumstances and conditions are, or are not substantially similar; and under the "Import" decision, competition *that affects rates* should be considered as one of the existing circumstances and conditions.

XXXVIII.

In the "Social Circle" decision, this Court holds that the question whether such competition exists in the particular case as "*affects rates*," and therefore whether the competition relied on in the particular case should be considered, is a *question of fact;* and where the United States Circuit Court of Appeals accepts and approves the finding of the Commission upon that question of fact, this Court will not, ordinarily, reverse.

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

XXXIX.

In the "Import" case, the Circuit Court conceded that the rates for the transportation of traffic from Liverpool and London to San Francisco were, in effect, fixed and controlled by competition; and the Court of Appeals in that case practically conceded the same thing.

162 U. S., 236, 237, T. & P. Ry. vs. I. C. C.

That case, therefore, presented the facts to this Court in such a way as to enable this Court to decide the main question of law, viz.: Whether competition which *affects rates* can be considered as among the circumstances and and conditions; and this Court held that it can.

In the case at bar, the Commission decided the question of fact against the Appellees. But a large amount of additional testimony was taken by both parties in the Circuit Court.

The Circuit Court, and the Circuit Court of Appeals, with *all* the testimony before them found, as a fact, that the competition upon which the Appellees rely does exist, that it *affects rates.* I submit that the finding of fact by those Courts is justly entitled to more weight in this Court than the finding of the Commission; especially as the Commission had before it *only a part of the facts* now in the record.

This case is presented to this Court, just as the "Import" case was presented, *i. e.*, with the Circuit Court, and the Circuit Court of Appeals both finding that the competition claimed by the Appellees in fact exists, and is such as to *affect rates*. And if this Court adheres to its decision in the "Social Circle" case, viz.: That the question is "one of fact," it will affirm the the decree of the Circuit Court of Appeals if it finds "nothing in the record to make it our duty to draw a different conclusion."

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

XL.

This Court said in the "Social Circle" case, that it is "for the tribunal appointed to enforce the provisions of the statute, whether the Commission *or the Court*, to consider whether *the existing circumstances or conditions*, were or were not substantially similar."

162 U. S., 193, 194, C., N. O. & T. P. Ry. vs. I. C. C.

The Court also said that the question whether "*the circumstances and conditions* were so dissimilar *as to justify the rates charged*." is a question "*of fact*."

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

If the "Social Circle" case had stood alone, it would still have been a mooted question as to whether *competition* is one of the "existing circumstances and conditions" which may legally be considered in determining whether the dissimilarity is such "as to justify the rates charged?" But that question *of law*, which was left undecided in the "Social Circle" case, was expressly decided in the "Import" case, where the Court said "*that among the circumstances and conditions to be considered*, as well in the case of traffic originating in foreign ports *as in the case of traffic originating within the limits of the United States*, competition that *affects rates* should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign freight, *which would otherwise go by other competitive routes*, are or are not undue or unjust, the fair interests of carrier companies and the welfare of the community, which is to receive and consume the commodities, are to be considered."

162 U. S., 233, 234, T. & P. Ry. vs. I. C C.

In the "Import" case, this Court not only decided, as a ques-

tion of law, that competition is one of the circumstances and conditions to be considered, but it also decided that the question *of fact* to be determined by the "Commission *or the Court*," is whether the competition is such that it "*affects rates*," *i. e.*, whether the low rate charged at the competitive point is necessary to secure freight "*which would otherwise go by other competitive routes.*"

162 U. S., 233, 234, T. & P. Ry. vs. I. C. C.

XLI.

While I submit with great confidence that the question has been decided by this Court in the "Import" case, and the "Social Circle" case, yet as opposing counsel contend otherwise, there is nothing left for me to do but to present again the arguments that were made in those cases.

As the phrase "under substantially similar circumstances and conditions" was imported into the fourth section from the second section, and as the third section is closely allied to the second and fourth, I will consider those three sections in their order.

XLII.

The Second Section of the Act to Regulate Commerce, and the English "Equality Clause."

Section 90 of the English "Railway Clauses Consolidation Act (1845)," known as the "Equality Clause," is the model from which the second section of the Act to Regulate Commerce was adapted.

For the convenience of the Court the English "Equality

Clause," and the second section of the Act to Regulate Commerce are here published in parallel columns:

EQUALITY CLAUSE.

English Act.

SEC. 90. Railway Clauses Act 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shal think fit; *provided*, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods and carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the line of railway under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."—*Second Annual Rep. I. C. C.* (1888), *page* 89.

UNJUST DISCRIMINATION CLAUSE.

American Act.

SEC. 2. Act to Regulate Commerce, 1887.

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."—24 *U. S. Stat. at Large, pages* 379 *and* 380.

It will be noticed that Section 90 of the English Act recognizes the right of the company to vary the tolls "so as to accommodate them to circumstances;" that it expressly authorizes the company to vary the tolls "upon the whole or any particular portion of the railway;" and that the "Equality Clause," which is a

mere *proviso* to that section, is, by its terms, confined to the single case where the goods pass "*only over the same portion* of the line of railway, under the same circumstances."

The English Court of Appeals, in 1884, per Lindley, L. J., said: "The expression, 'passing *only* over the same portion of the line' appears to us to mean *passing between the same points of departure and arrival, and passing over no other part of the line.*"

4 Railway & Canal Traffic Cases, p. 452, M. S. & L. Ry. Co. vs. The Denaby Main Colliery Co.

4 Railway & Canal Traffic Cases, p. 460, Murray vs. G. & S. W. Ry. Co.

6 Railway & Canal Traffic Cases, p. 141, The Denaby Main Colliery Co. vs. The M. S. L. Ry. Co.

Law Rep. 21, Q. B. (1888), pp. 217, 218, L. & Y. Ry. Co. vs. Greenwood.

Counsel for the Appellant may rely upon the English Cases of the Railway Company vs. Sutton; Evershed's Case; and the Denaby Main Colliery Co. Case; as holding that the words, "under the same circumstances," used in the English "Equality Clause," apply *alone* to the "circumstances of *the carriage;*" that goods are carried under "like circumstances" where *rate of speed, risk and expense of carriage are the same;* and that competition cannot be regarded as a "circumstance" within the meaning of the English "Equality Clause."

The English "Equality Clause" had no application where the freight of one shipper, though carried over the same line, *was carried a greater distance from a common point of departure* than the freight of another shipper. In such a case, the freight carried the greater distance would pass "over the same portion of the line" as the freight carried the lesser distance; but the freight carried the greater distance would also pass over an *additional* portion of the line; and, therefore, the two shipments would not pass "*only* over the same portion of the line."

Law Rep. 21, Q. B. (1888), pp. 217, 218.

As the English "Equality Clause" only applied to traffic "passing between the *same* points of departure and arrival," it is manifest that the question as to the effect of a substantial dissimilarity in the *competitive* conditions which might prevail at *different* points of *departure*, or at *different* points of *arrival*, could not possibly arise under that clause.

Suppose the line A B to represent a railroad.

Suppose two or more shipments of freight, of the same class or description, to be made from A to B; the English "Equality Clause" would apply; because the shipments would pass only over the same portion of the line, from the same point of departure, to the same point of arrival.

If the railroad A B has no conpetition, there will be no limit to the rates which it can charge, except that they be reasonable, in and of themselves, and not higher than the traffic can afford to pay. Such non-competitive rates must, however, be charged equally to all persons, on all goods of the same description, passing from A to B, "under the same circumstances."

If, however, there be other lines which compete with the railroad A B, and, in consequence thereof, it be forced to accept competitive rates, which are lower than it might otherwise reasonably charge; still, if it accept such competitive rates from one person shipping from A to B, it must accept from all other persons shipping from A to B the same competitive rates, equally, in respect of all goods of the same description, passing from A to B, under the same circumstances.

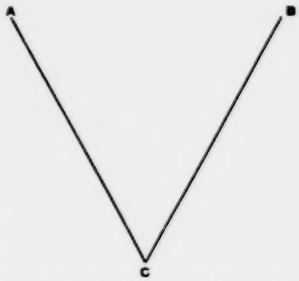
It was, therefore, said in some of the English cases, that the word "circumstance," *as used in the English "Equality Clause,"* did not refer to *competitive* conditions. The reason was, that whatever competition might exist, it necessarily affected all shippers, equally; because the "*Equality Clause*" did not apply in any case unless the same class of goods were shipped *between the same points of departure and arrival.*

It was also said, in the same English cases, and for the same reason, that the words "under the same circumstances," *as used in the English "Equality Clause,"* apply alone to the circumstances of "the carriage;" and that goods are carried under "like circumstances," whenever the rate of speed, risk, and expense of carriage are the same.

One of the errors of the Commission in this case resulted from the fact that it applied to the second, third, and fourth sections of the Act to Regulate Commerce, a construction which some of the English courts had applied to their "*Equality Clause;*"

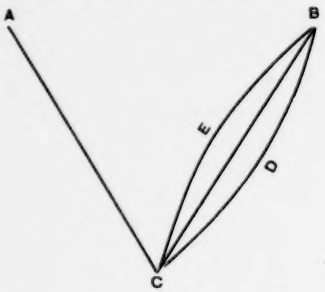
the Commission overlooking the fact that the "*Equality Clause*" did not affect any shipments, except such as passed *only over the same portion of the line, between the same points of departure and arrival.*

Suppose the line A C and the line B C to represent two lines of railroad, belonging to the same company:



Suppose said lines to be of equal length. Suppose a shipment of a certain class of freight to be made from A to C; and, at the same time, a shipment of the same class of freight to be made over the equal distance, from B to C; the English "*Equality Clause*" would *not* apply. The point of arrival would be the same; but the points of departure would be different, and the shipments would pass over different portions of the line. So, if a shipment of a certain class of freight be made from C to A, and, at the same time, a shipment of the same class of freight be made over the equal distance, from C to B, the English "*Equality Clause*" would *not* apply. The point of departure would be the same; but the points of arrival would be different, and the shipments would pass over different portions of the line. Certain competitive conditions might govern traffic passing between B and C, which would be substantially dissimilar from those governing traffic passing between A and C; as will be illustrated in the next diagram.

Suppose the line A C, and the line B C, to represent the same two lines of railrod as were shown in the last diagram.



Suppose the curved lines C D B and C E B to represent railroads, or navigable rivers, which are in competion with the line B C. The rates offered by those competing lines must be met by the line B C, or it must abandon the business; and yet, if it meets the competitive rates, it must accept lower rates from B to C, than it accepts for the equal distance, from A to C; notwithstanding the rates from A to C may be reasonably low, in and of themselves. If the company were compelled to retire from competition on the line B C, and abandon that traffic to the rival lines, the company would have no source of freight revenue, except the freight passing between A and C; and, assuming the volume of such freight to be equal to the volume of freight passing between B and C, the company would be compelled to charge higher rates between A and C, than it could have afforded to accept, if it had been allowed to compete for freight between B and C.

If the English "*Equality Clause*" had been applied to shipments from different points of departure, or to different points of arrival, persons shipping between B and C, would have been deprived of their natural advantage, consisting of the fact that they had two or more competing lines upon which to rely for the transportation of their traffic; and persons shipping between A and C, would have been deprived of their natural advantage, consisting of the fact that they could have obtained very much lower railroad rates, if the line B C had been allowed to compete with its rivals, and the company had not been forced to rely for its support, exclusively upon freight passing between A and C.

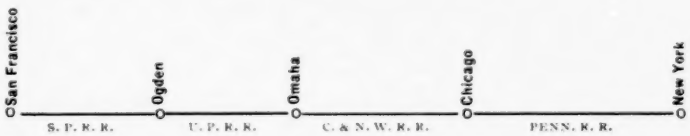
XLIII.

The English "Equality Clause" not Suited to This Country.

It appears from a statement made by Senator Sherman on the 14th of January, 1887, in the debate on the Act to Regulate Commerce, that the words, "and from the same original points of departure, or from the same points of arrival," were at one time contained in the bill then under discussion; and that those words were stricken out by the Conference Report.

While the English "*Equality Clause*" may be suited to the commerce of a small country like England, where the lines of railway are comparatively short, such a clause would be highly detrimental in this country, where several lines of railroad engage in the transportation of traffic for very great distances, and frequently carry traffic entirely across the continent. Congress, therefore, acted wisely, in striking out the words referred to by Senator Sherman; and in adopting the words, "under substantially similar circumstances and conditions," which import a very different meaning from the words, "under the same circumstances," as found in the English "*Equality Clause*," which was confined in its operations to shipments passing only over the same portion of the line, between the same points of departure and arrival.

Suppose the following diagram to represent a joint through line from San Francisco to New York, composed of the separate lines of five different railroad companies:



Suppose two car loads of wheat to be shipped from San Francisco, on the same day, and in the same train; that one of said cars be destined to Ogden, where the wheat contained in it is to be ground into flour, and consumed. Suppose the other car load

of wheat be destined to New York, whence it is to be exported to Liverpool, to be sold in competition with wheat grown in Russia, India, or Argentine. Now, if the English "*Equality Clause*" had been adopted by Congress, and with the construction which some of the English courts placed upon the words "under the same circumstances, *as used in that clause*, the Southern Pacific Railroad Company would have been compelled to charge precisely the same rate, per ton, per mile, upon the car load of wheat destined to New York, as it charged upon the car load destined to Ogden. The two shipments would have consisted of "goods of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the railway, under the same circumstances." All the "circumstances *of the carriage*," *by the Southern Pacific Railroad Company*, would have been exactly the same. "*The rate of speed, risk and expense of carriage*," by that railroad, would have been exactly the same. Every circumstance and condition which could have had the slightest relation, "*to the nature and character of the service rendered by the carrier*," or which could possibly have affected the "*cost of transportation*," was, *so far as the Southern Pacific Railroad was concerned*, exactly the same in the case of the car destined to New York, as in the case of the car destined to Ogden. The points of arrival and departure, *so far as the Southern Pacific Railroad* was concerned, would have been exactly the same; and yet no one will pretend that the Southern Pacific Railroad Company would have been obliged to charge as much per ton, per mile, on the car destined to New York, as it charged upon the car destined to Ogden.

If the joint through rates, charged by a long through line of American railroads, were required to be equal to the sum of the separate through rates of the different railroads forming the through line, it would be impossible to move a very large per cent. of the traffic of this country.

2 I. C. C. Rep., 584, Lippman vs. I. C. R. R.

XLIV.

English Cases Upon the Equality Clause Which May be Relied Upon by Counsel for the Appellant.

Cases which may be relied upon are: The Great Western Ry. Co. vs. Sutton, Law. Rep 4, H. L., p. 226; L. & N. W. Ry. Co. vs. Evershed, Law Rep., 3 App. Cas., p. 1029; M. S. & L. Ry. Co. vs. Denaby Main Colliery Co., Law Rep., 11 App. Cas., p. 97, reported also in 6 Railway & Canal Traffic Cases, p. 133.

The Sutton case was this: Sutton was what is known in this country, as an express carrier, and was engaged in doing an express business over the line of the Railway Company. The Railway Company was also engaged in doing an express business, on its own account, over its own line; and the express goods carried by the Railway Company were of the same description, and were carried *only over the same portion of the line*, and under the same circumstances, as were the express goods which were carried for Sutton. *As the points of departure and arrival were the same*, with reference to Sutton's goods, as they were with reference to the express goods carried by the Railway Company on its own account, the discrimination was held to be a violation *of the "Equality Clause."*

Suppose the Adams Express Company were conducting an express business over the line of the Appellees, between New York and Montgomery, and that the Appellees were also engaged in conducting an express business on their own account, over their own line, between the same points. The Sutton case decides that the Appellees could not charge the Adams Express Company higher rates than they charge for express matter carried upon their own account, between the same points; but it does not decide that the Appellees could be compelled to accept from the Adams Express Company the same rate for transportation between New York and Troy, as they may be accepting for similar traffic shipped between New York and Montgomery.

The Evershed case was this: The Midland Railway Company, and the London & Northwestern Railway Company were in active competition at Burton-upon-Trent.

Certain persons owned breweries at Burton-upon-Trent, adjacent to the main line of the Midland Railway, and had side tracks running from said main line into their breweries; so that their freights could be loaded and unloaded by their own servants, directly upon the cars of the Midland Railway, without any expense for cartage, or other terminal charges. The plaintiffs also owned breweries at Burton-upon-Trent; but their breweries were not connected with the Midland Railway, by side track, or otherwise. The London & Northwestern Railway charged the plaintiffs, whose breweries were not connected with the Midland Railway, cartage for hauling the plaintiffs' goods from their breweries to the depot of the L. & N. W. Ry.; but, as to those persons whose breweries were connected with the Midland Railway by side tracks, the L. & N. W. Ry. Co. hauled their goods to and from its depot, free of charge. It resulted that two persons might ship by the L. & N. W. Ry. Co. goods of the same description, from the same point of departure (*i. e.*, Burton-upon-Trent), and to the same point of arrival, the goods passing only over the same portion of the line, and yet the rate charged by the L. & N. W. Ry. Co. against one of them, would be greater (to the extent of the cartage charge), than the rate charged against the other.

If the Appellees in this case were to charge more to one shipper than another, where both shippers were sending the same description of goods from New York to Troy, the Evershed case would be an authority against the Appellees; but there is nothing in the Evershed case, which intimates that upon a shipment from New York to Troy, the Appellees are bound to accept the same rate as from New York to Montgomery.

The Evershed case was recently cited by the Sixth Circuit Court of Appeals, in the case of D. G. H. & M. Ry. vs. I. C. C., and it was said by the Court that the Evershed case has been "very much restricted," if not "overruled," by the subsequent cases.

74 Fed. Rep., p. 835; D. G. H. & M. Ry. vs. I. C. C.

This Court, in the "Import case," said that the Evershed case has been "much modified, if not fully overruled by the later cases."

T. & P. Ry. vs. I. C. C., 162 U. S., 224.

The Denaby Main Colliery Co. case was this: A railway company carried coal for different customers "only over the same portion" of its line of railway; and it was held, that the fact that the coal carried for one customer was to be shipped to certain ports, in order to develop a new trade, or to open up new markets, and so to increase the tonnage carried, did not constitute such a difference in the "circumstances," as to justify an inequality of rates.

The House of Lords, in the Denaby Main Colliery Co. case, referring to Sutton's case, and Evershed's case, states, that the goods in those cases were carried *only* "*over the same portion of line.*"

> See the Report of the Denaby Main Colliery Co. case, in 6 Railway and Canal Traffic Cases, pp. 133, 141.

If two persons were to ship the same description of goods, by the line of the Appellees, from New York to Troy, and the Appellees should charge one of them a less rate than the other, merely because the goods of the former were intended for some specific purpose, the Denaby Main Colliery Co. case would be an authority against the Appellees; but there is nothing in that case to intimate that the Appellees are bound to accept a rate from New York to Troy not higher than their rate from New York to Montgomery.

XLV.

Other English Cases Upon the "Equality Clause."

In the case of the Attorney-General vs. B. & D. J. Ry. Co., 2 Eng. Ry. and Canal Cases, p. 124, it appeared that the Birmingham & Derby Junction Railway Act empowered that company to receive from passengers conveyed by the company's carriages, tolls, not exceeding a specified amount. By the sixty-third section of a subsequent Act, it was provided that the charges by the first Act, authorized to be made for the carriage of passengers, goods, etc., "shall be at all times charged equally, and after the same rate per ton, per mile, in respect of all passengers and goods of a like description, and conveyed or propelled by a like car-

riage or engine passing *on the same portion of the line only, and under the same circumstances*," etc. p. 127.

The B. & D. J. Ry., commencing at Derby, intersected the L. & B. Ry. at Hampton-in-Arden. Afterward the Midland Counties Ry. was built from Derby to an intersection with the L. & B. Ry. at Rugby. There were then two competing routes from Derby to London; and the new route opened by the M. C. Ry. was the shortest. In order to meet that competition, the B. & D. J. Ry. Co. charged through passengers who were traveling between the competitive points, Derby and London, at the rate of two shillings between Derby and Hampton-in-Arden, while they charged local passengers who were only traveling between the non-competitive points, Derby and Hampton-in-Arden, or points on the L. & B. Ry., short of London, at the rate of eight shillings between those points.

The Attorney-General filed a bill against the B. & D. J. Ry. Co., charging that said company had fixed the aforesaid unequal charges, since the opening of the M. C. Ry., "in order to induce passengers, goods, and merchandise to be conveyed to Derby by way of their railway; and for that purpose have made a reduction in the charge for conveyance by them, in favor of persons traveling upon the railway between Hampton-in-Arden and Derby, who are proceding from or to London along the L. & B. Ry., and who would otherwise travel by the M. C. Ry., although such persons traveled upon and used the railway between Hampton-in-Arden and Derby *under the same circumstances* with persons in favor of whom no such deduction is made." p. 129.

The bill prayed (p. 130) "that it may be declared that the charges made by the B. & D. J. Ry. Co. for the carriage of passengers, goods, wares, and merchandise conveyed by the company, and *passing on the line of the railway for the whole distance between Hampton-in-Arden and Derby by the same or like trains, propelled by the same or like carriages*, ought to be charge l equally and after the same rate, whether such passengers, goods, merchandise, etc., proceed on, or are conveyed along the L. & B. Ry. for the whole distance from or to London or not, ... and that the company be restricted from charging lower rates in respect of such passengers, goods, and merchandise as pass along

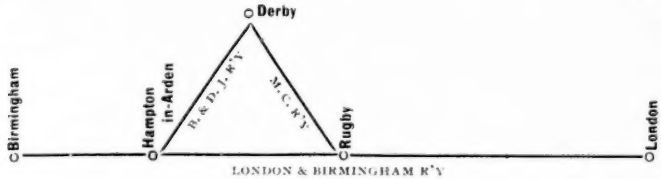
the L. & B. Ry. for the whole distance between London and Hampton-in-Arden, than the rate charged by said company in respect of such passengers, goods, and merchandise as do not pass along the L. & B. Ry. at all, or so pass for a distance short of the whole distance between London and Hampton-in-Arden."

The Lord Chancellor dismissed the motion with costs, saying: "It is not denied that they (the company) carry those who are going (from Derby to Hampton-in-Arden) at the charge which they are authorized to make, but persons traveling *under other circumstances*, not intending to stop there, but going on to London, are, according to the Attorney-General's complaint, charged two shillings instead of eight shillings. Now, I do not know who will suffer by that arrangement, whatever may be the cause of it. . . . The Attorney-General now asks me to interfere to prevent the company carrying passengers (between competitive points) at too low a rate. . . . It is not necessary to say anything about the jurisdiction of the Court, or how far I should interfere if I had the power, because I am quite clear that the sixty-third section has not the slightest reference to this case." p. 132.

The sixty-third section of the B. & D. J. Ry. Act was almost identical with the English "Equality Clause." All passengers who were carried by the B. & D. J. Ry. from Derby to Hampton-in-Arden were, so far as that railway was concerned, carried *from the same point of departure to the same point of arrival;* and therefore they were carried *over "the same portion of the line only."* They were *conveyed in the same cars, propelled by the same engines, and under the same circumstances*, so far as "*the rate of speed, risk, and expense of carriage*" by that railway were concerned. Every circumstance and condition which could have had the slightest relation "*to the nature and character of the service rendered by the carrier*," or which could possibly have affected *the* "*cost of transportation*," was, so far as that railway was concerned, exactly the same, in the case of one of those passengers, as it was in the case of the other. It follows, therefore, that the Chancellor, in holding that the "Equality Clause" did not apply, must have been of opinion that passengers carried between competitive points (*i. e.*, between Derby and London) are not carried

under the same circumstances as local passengers carried between non-competitive points (*i. e.*, between Derby and Hampton-in-Arden); notwithstanding both classes of passengers may have traveled over the same portion *of the B. & D. J. Ry.*, in the same cars, propelled by the same engines.

The following diagram sufficiently illustrates the competitive situation which existed between the Birmingham & Derby Junction Railway and the Midland Counties Railway, referred to in the case last cited:



XLVI.

LEGISLATIVE HISTORY OF THE SECOND SECTION OF THE ACT TO REGULATE COMMERCE.

On January 6, 1886, Hon. John H. Reagan introduced in the House of Representatives, H. R. 2412, known as the "Reagan Bill."

The first section declared it to be unlawful, "directly or indirectly to charge to, or receive from, any person, any greater or less rate or amount of freight, compensation, or reward than is charged to, or received from, any person, or persons, for *like and contemporaneous service* in the carrying, receiving, delivering, storing, or handling of the same," etc.

On January 18, 1886, Senator Cullom introduced in the Senate, S. 1093, known as the "Cullom Bill."

The second section declared it to be unlawful, directly or indirectly, to charge or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects or receives from any other person or persons for doing for him or them "a *like and contemporaneous service, in*

the transportation of a like kind of traffic, under substantially similar circumstances and conditions."

It will be noticed that the second section of the Cullom Bill adopts from the first section of the Reagan Bill, the phrase, "like and contemporaneous service;" but adds two very important qualifications to that phrase, viz., that the traffic shall be of like kind, and that the circumstances and conditions shall be substantially similar.

The prohibition against unequal charges in cases of "*a like and contemporaneous service*," contained in the Reagan Bill, was sufficient to cover every circumstance and condition that could possibly affect the *cost to the carrier*; and if it had been intended that the *cost to the carrier* should be the sole, or controlling factor in fixing rates of transportation, the Reagan Bill needed no amendment, whatever, on that point. For, if the *service* is "*like and contemporaneous*" in two cases, the *cost to the carrier* of performing the mere transportation service would be, practically, the same in each case. A car loaded with coal, and a car loaded with dry goods, if carried the same day, in the same train, propelled by the same engine, over the same portion of the road, would present a case of "like and contemporaneous service," under the Reagan Bill; and assuming the weights of the two car loads to be the same, the *cost to the carrier* of the mere transportation service, would be, practically, no more in the case of the car load of dry goods, than it would be in the case of the car load of coal.

Grave fears were expressed that the Reagan Bill, if passed, would compel a railroad, in the case last supposed, to charge as much for the car load of coal, as for the car load of dry goods; and, consequently, that the Reagan Bill would destroy the entire system of railroad freight classification. In order to remove all doubt upon that point, the Cullom Bill provided that before equality of charge can be demanded, it must be shown not only that the *service was* "*like and contemporaneous*," but also that the service was rendered "in the transportation *of a like kind of traffic*." None of the low class freight could be moved at all, if forced to pay first-class rates, or even the average of all the rates, charged by railroads for transportation. (Wholesale Prices, Wages and Transportation, Senate Report, 1394, 2d Sess., 52d Cong., Part 1, p. 403.) The Cullom Bill, therefore, authorized the railroads, even where the *cost to the carrier* was, practically, the same, to so graduate their rates upon each "*kind of traffic*," as to enable all

kinds to be moved, without injustice to any; thus recognizing as sound the much-abused and misunderstood principle of charging no more than the particular "traffic can bear."

But the Cullom Bill went still further. It recognized the fact that there might be "a like and contemporaneous service;" and that such service might be rendered "in the transportation of a like kind of traffic;" and yet, that it might be ruinous to the best interest of the country, to force an absolute, unconditional equality of charge in every case. It was known that the products of the West, and Northwest, could never reach the seacost, if the joint through rates, charged by a long through line of railroads, were required to be equal to the sum of the separate through rates of the different railroads forming the through line.

2 I. C. C. Rep., 584, Leppman vs I. C. R. R.

It was known that the destruction of that traffic would destroy the competition which has existed between the various cities of the Northwest, for the control of that traffic; and that it would also destroy the competition which has existed between the different railroads of that section, for the carriage of that traffic. In order to protect those vast interests, the Cullom Bill provided, that before equality of charge can be demanded, three important facts must be shown:

First: That the *service* "is like and contemporaneous." This covers every element that can enter into the *cost to the carrier* of rendering the service.

Second: That the service shall be rendered in the transportation of "*a like kind of traffic.*" This preserves the system of railroad freight classification.

Third: That the transportation service shall be rendered under "substantially similar circumstances and conditions." This general clause was intended to cover all such other circumstances and conditions as should properly influence the making of railroad rates; and, among others, the important conditions arising out of the competition of carrier with carrier, market with market, and product with product.

I submit with great confidence that the principal object of using the phrase, "under substantially similar circumstances and conditions," in the second section of the Cullom Bill, was to cover those circumstances and conditions which arise out of one, or the other, of the three kinds of competition just mentioned.

XLVII.

THE CONSTRUCTION OF THE SECOND SECTION BY THIS COURT.

In the case of the I. C. C. vs. B. & O. R. R., 145 U. S., 281, known as the "party rate" case, Mr. Justice Brown said:

"In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, *under substantially similar circumstances and conditions.*' To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

"In this connection we quote with approval, from the opinion of Judge Jackson in the Court below: 'To come within the inhibition of said section, the differences must be made under like *conditions;* that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances *and conditions.* In respect to passenger traffic, *the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other*, and there must be found to exist *substantial identity of situation* AND *of service*, accompanied by irregularity and partiality, resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination." p. 282.

The Commission insists upon applying to the second section of our Act, certain language to be found in certain English cases, decided upon the English "Equality Clause," which was confined to shipments moved between the same points of departure and arrival, and which passed only over the same portion of the line. The Commission insists upon its rule of construction, notwithstanding Congress purposely omitted all reference to the English requirement in regard to the goods passing "only over the same portion of the line;" and deliberately

struck out of the Act all reference to points of departure and arrival.

The Supneme Court said that the Act was not intended "to prevent competition between different roads;" and, if that be so, the dissimilarity in the *competitive* "CONDITIONS," or in the *competitive* "SITUATION," may be legitimately considered, as well as the "service" rendered by the carrier.

The only object which the B. & O. R. R. had in selling "party rate" tickets, was to enable it to compete successfully with its rivals who had not seen proper to issue that kind of tickets.

The Commission not only restricts the comparison to the "service" performed by the carrier, but it insists that, in comparing the "service," only those elements shall be considered which have relation "to the *cost*" to the carrier, of rendering the service. This is the more remarkable, because the Commission admits the well-known fact that it is "impossible to apportion, with accuracy, the *cost* of service among the items of traffic;" and, in consequenee thereof, that "the propositions which, from time to time, have been made in other countries to measure the charges of the carrier by the cost of the carriage, solely, have always been abandoned after investigation"

1 I. C. C. Rep., 63, 64, in re. L. & N. R. R. Co.

By restricting the comparison to those elements only which have relation "*to the cost*" to the carrier of rendering the service, the Commission "ignores the element of *the value of the service (to the shipper)* in fixing the reasonable compensation, and denies the shipper any remuneration for additional *risk*."

It was because the Commission had disregarded the element of *the value of the service*, and had denied the carrier any remuneration for additional *risk*, that Judge Wallace refused to enforce the order of the Commission in the case of I. C. C. vs. D. L. & W. R. R. Co., 64 Fed. Rep., 724.

The "*value of the service*" rendered by one carrier, cannot exceed the rate for which a competing carrier may offer to perform the same service.

And, therefore, the consideration of "the *value* of service *necessarily involves the competition which limits that value.*"

XLVIII.

The Third Section of the Act to Regulate Commerce, and the Second Section of the English Act of 1854.

Section 2 of the English "Act for the better regulation of the traffic on Railways and Canals" (10th July, 1854); and the 11th section of the English "Act to make better provisions for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith" (21st July, 1873); contain certain provisions from which the third section of the Act to Regulate Commerce was modeled.

For the convenience of the Court, I print in parallel columns, so much of said section as are material for the present purpose:

UNDUE PREFERENCE CLAUSE.

English Act.

Sec. 2. Railway and Canal Traffic Act, 1854.—1 *Nev. & Mac., p.* 2.

Sec. 11. Railway and Canal Traffic Act, 1873.—1 *Nev. & Mac., p.* 11.

. . . . And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.—1 *Nev. & Mac., pp.* 2-11.

UNDUE PREFERENCE CLAUSE.

American Act.

Sec. 3. Act to Regulate Commerce.

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat. at Large, p.* 380.

XLIX.

The History of the Second Section of the English Act of 1854.

The following history of the second section of the English Act of 1854 is taken from the opinion of the Court in the case of Lancashire & Yorkshire Railway Co. vs. Greenwood, Law Rep. 21, Q. B. (1888), pp. 217, 218, decided April 25, 1888; cited by the Sixth Circuit Court of Appeals in D. G. H. & M. Ry. Co. vs. I. C. C., decided April 14, 1896. 74 Fed. Rep., p. 835.

"In the Railways Clauses Consolidation Act, 1845, (8 & 9 Vict. C. 20), Section 90, there was a provision requiring that the company should charge equal rates; but that had been construed by the courts to mean equal rates for the carriage of goods *over the same portions of the line*, so that, if there was a charge from A to B, which was equal to all persons sending goods from A to B, no objection could be raised to that under section 90 of the Railways Clauses Consolidation Act; but if a particular person X was charged so much for the carriage of his goods from A to B, and another person Y was charged less, then there was inequality within the meaning of section 90 of the Railways Clauses Consolidation Act, which entitled the person aggrieved to maintain an action for the amount which had been overcharged to him."

"Where, however, the places over which the goods were carried were not the same, as for instance where there was a charge of so much from A to B, and of so much from B to C, then although the charges might be the same, while the distances were only half in the one case what they were in the other, yet that was not an inequality within section 90 of the Railways Clauses Consolidation Act."

"In order to meet this grievance the Railway and Canal Traffic Act, 1854, was passed, and by section 2 of that Act it is open to any person to complain that he is subjected to undue or unreasonable prejudice or disadvantage by reason of the charge for carriage from A to B being excessive as compared with what is charged for carriage from B to C. That complaint was one which before then he could not have made; but under the Rail-

way and Canal Traffic Act, 1854, he is enabled to go before the Court to make that complaint."

"Obviously the considerations would be of a somewhat intricate nature. It would be necessary to inquire what were the reasons why more was charged for one distance than was charged for another distance, or why proportionately more was charged for one distance than was charged for another, and that would depend upon a great many considerations arising out of *the nature of the traffic*, the peculiar facilities, THE COMPETITION WHICH MIGHT BE DEVELOPED and a great many other matters which quite obviously were unfit to be tried by a jury, and therefore the Legislature thought fit when passing the Railway and Canal Traffic Act of 1854 to add section 6 which is in these terms: No proceeding shall be taken for any violation or contravention of the above enactment except in the manner herein provided," etc. . . .

"The manner provided in the Railway and Canal Traffic Act was by application to the Court of Common Pleas by motion or summons and peculiar powers were given to the Court to enable them to deal with the complaint when it arose, and to arrive at a just estimate as to whether there was or was not any grievance to which the complainant had been subjected. As I have said it was a matter which was necessarily complicated; and very unfit indeed to be tried by a common jury to whom the consideration that the charge from A to B was larger in proportion to the mileage than the charge from B to C *presented almost irresistible attractions.*"

The jurisdiction was afterward transferred from the Court of Common Pleas to the Railway Commissioners by the Regulation of Railways Act, 1873 (36 and 37 Vict. C., 48), Section 6.

Law Rep. 21 Q. B. (1888), pp. 217, 218, and note on p. 218, L. & Y. Ry. Co. vs. Greenwood.

The Italics in the above quotation are mine.

L.

English Cases Under the Railway and Canal Traffic Act, 1854.

The case of Hozier vs. The Caledonian Ry. Co., 1 Nev. & Mac., pp. 27–32, was decided in 1855.

Hozier filed a petition against the Caledonian Ry. Co., alleging that he was aggrieved by being charged nine shillings six pence, for traveling between Motherwell and Edinburgh, a distance of forty-three miles, while passengers traveling in the same train, and in the same class of carriage between Glasgow and Edinburgh, a distance of fifty-nine miles, were charged only two shillings; and that the through rates charged between Edinburgh and Glasgow amounted to an undue and unreasonable preference in favor of such through passengers over petitioner and others, traveling between Motherwell and Edinburgh, or Motherwell and Glasgow, and intermediate places.

1 Nev. & Mac., p. 28.

The petition was dismissed.

Lord Curriehill said: "The only case stated in the petition, is that passengers passing from Glasgow to Edinburgh, or from Edinburg to Glasgow, are carried at a cheaper rate (*aggregate*) than passengers from Motherwell to either of these places. Now, that is an advantage, no doubt, to those passengers traveling between Edinburgh and Glasgow. But is it an *unfair* advantage over other passengers traveling between intermediate stations? The complainer must satisfy us that there is something *unfair* or *unreasonable* in what he complains of, in order to warrant any interference. Now, I have read the statements in the petition, and I have listened to the argument in support of it, to find what is *unreasonable* in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none."

1 Nev. &. Mac., pp. 31 and 32.

In the report of the case in the *Law Times*, Lord Curriehill is said to have added: "This petitioner's complaint may be likened to that of the laborer, who, having worked all day, complained

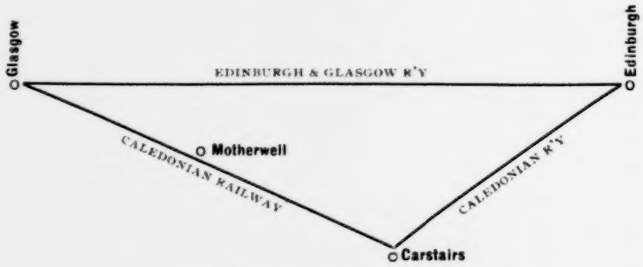
that others, who had worked much less, received a penny, like himself."

1 Nev. & Mac., p. 32, note 4.

That case was cited by this Court, in the case of the Interstate Commerce Commission vs. B. & O. R. R. Co., as holding, in substance, "that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road who were obliged to pay at a greater rate"—(145 U. S., p. 282); and it was again cited and quoted from by this Court in T. & P. Ry. vs. I. C. C. (162 U. S., p. 222), known as the "Import" case.

The Hozier case certainly decides that to charge local passengers a greater compensation, *in the aggregate*, for a shorter distance, than is charged through passengers, for a longer distance, between competitive points, does not subject the local passengers "to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatever," notwithstanding the passengers, through as well as local, may travel over the same line, in the same direction, in the same trains, and in the same class of carriages.

The following diagram sufficiently illustrates the competitive situation which existed between the Caledonian Ry. and the Edinburgh & Glasgow Ry.:



In the Hozier case, the Lord President based his judgment upon the fact that the petitioner had not shown any title or interest to maintain the proceeding; his opinion being that, before a case of undue preference can be made out, under the Act of 1854, the parties must stand "*pari passu* in the matter," *and must be brought* "*into competition*, in order to give them an interest to complain." See 1 Nev. & Mac., p. 30.

145 U. S., pp. 282, 283.

According to the opinion of the Lord President, it would be necessary, in this case, to show that the town of Troy stands in *pari passu* with the city of Montgomery, *and that those two places are in competition with each other.*

Lord Curriehill declined to found his opinion on the want of title or interest in the petitioner to maintain the proceeding, and based his judgment upon the merits, viz.: That while the carriage of passengers between the competitive points (Glasgow and Edinburgh) at a cheaper rate than passengers to or from non-competitive points was an advantage or preference to those passengers traveling between the competitive points (Glasgow and Edinburgh), it was not an *unfair* advantage, nor an *undue* preference of those passengers over passengers traveling to and from non-competitive points.

It is immaterial, therefore, whether the decision in the case be based upon the opinion of the Lord President, or upon the opinion of Lord Curriehill; for, in either event, it is equally valuable as an authority in my favor.

The case of Jones vs. E. C. Ry. Co., 1 Nev. & Mac., pp. 45–47, was decided in 1858.

It appeared in that case, that the Eastern Counties Ry. Co. managed and controlled a railway running from London, via Colchester, and Manningtree, to Harwich. It was about 50 miles from London to Colchester; and about 70 miles from London to Harwich. Passengers traveling from London to Harwich, or the reverse, *passed through Colchester.* The railway company charged for season tickets from Colchester to London (say 50 miles), £45 per year; while it is charged from Harwich, *through Colchester*, to London (say 70 miles), £20 per annum.

The Court refused a rule for an injunction. Williams, Judge, said: "For anything that appears, *there may be very good reasons for making such difference in price.* . . . At this moment *there is active competition at Reading between the Great Western and Southwestern Railways;* the consequence is, *that considerably less is charged for tickets from that place to London, and vice versa, than for intermediate stations.*" pp. 46, 47.

Wills, Judge, said: "To bring the case within the Act (of 1854) you must show, as we held the other day in the case of

Harris and the Cockermouth & Workington Railway Company, *that the journeys are substantially the same.*"

While it did not appear of record in the case that there was any competition between Harwich and London, and while there *was*, in fact, no *rail* competition, yet as Harwich was on the North Sea, and London was on the Thames River, the Court doubtless took judicial knowledge of the fact that there was at least *water* competition between Harwich and London.

The case decides that the fact that local passengers to, or from, non-competitive points, are charged a greater compensation *in the aggregate* for a shorter distance, than is charged through passengers for a longer distance between competitive points, does not determine that the local passengers are subjected "to any *undue or unreasonable* prejudice in any respect whatever;" notwithstanding the passengers, through, as well as local, may travel over the same line, in the same trains, and in the same direction.

. . . It decides that a journey between competitive points (London and Harwich) *is not substantially the same* as a journey between non-competitive points (London and Colchester). It recognizes the fact that active competition exists at points between which through passengers are carried, affords "*a very good reason for making a difference*" between the rates charged such through passengers, and the rates charged local passengers, at points where no competition exists.

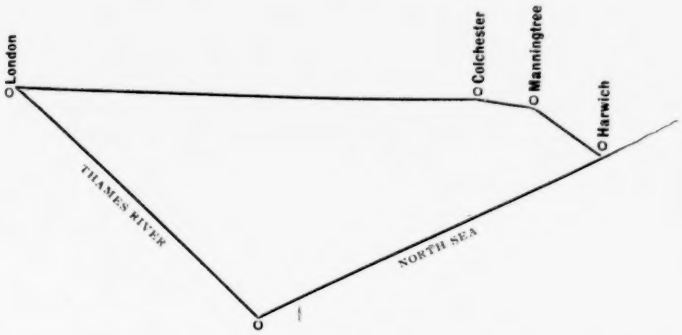
1 Nev. & Mac., p. 46

I submit that if competition affords *a good reason* for making a difference between competitive and non-competitive rates, it cannot be maintained that the transportation of local passengers, to or from non-competitive points, is done "under substantially similar circumstances and conditions" with the transportation of through passengers between competitive points, when competition forces the company to make the lower rate.

That case was cited by this Court in the case of the Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., p. 283.

The following diagram sufficiently illustrates the competitive

situation which existed between the Eastern Counties Ry., and the water routes:



The case of Foreman *et al.* vs. Great Eastern Ry. Co., 2 Nev. & Mac., 202, was decided by the English Railway Commissioners in 1875.

It appeared that the complainants imported coal, in their own ships, from points in the north of England, to Great Yarmouth, and forwarded the coal to various stations on the defendant's railway, between Great Yarmouth and Petersborough.

The complainants stated that the defendant's rates for carrying coal from Yarmouth, to stations in the interior, at which complainants dealt, were unreasonably greater than the rates charged, in the opposite direction, from Petersborough to such stations; and that such difference in rates was made by the defendants for the purpose of favoring the carriage of coal from the interior, as against coal brought to Yarmouth by sea, and carried thence into the interior over the defendant's railway.

In brief, the complaint was that the defendants gave an undue preference to coal shipped from mines on their line in the interior to the sea coast, over coal shipped from the sea coast into the interior. The Commissioners found that it was true that the defendants did carry coal from the interior to London, Yarmouth, and other sea ports on their line, at exceptionally low rates; but that it was done for the purpose of meeting the *competition* existing at those places.

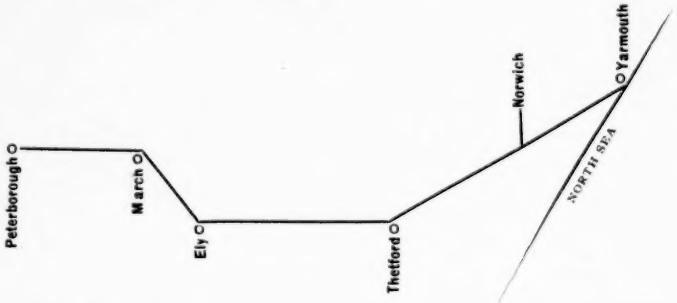
It appears that the rate from Petersborough to Thetford (51 miles), was 4s. 4d., while the rate from Petersborough to Yarmouth (100 miles), was only 3s. 5d. pp. 205, 206.

The Commissioners said:

"As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company cannot be said to prefer other traffic to theirs; NOR DOES THE TRAFFIC ACT PREVENT A RAILWAY COMPANY FROM HAVING SPECIAL RATES OF CHARGE TO A TERMINUS TO WHICH TRAFFIC CAN BE CARRIED BY OTHER ROUTES OR OTHER MODES OF CARRIAGE WITH WHICH THEIRS IS IN COMPETITION."

2 Nev. & Mac., pp. 205, 206.

The following diagram sufficiently illustrates the competitive situation at Yarmouth, on the North Sea:



In that case, the rate from Petersborough to Thetford (the shorter distance point), was greater, *in the aggregate*, than the rate from Petersborough to Yarmouth (the longer distance point); and the only circumstance or condition to justify the preference shown to Yarmouth, was the sea *competition* which existed there, but which did not exist at Thetford.

The Foreman case was cited and quoted from by this Court, in T. & P. Co. vs. I. C. C. (162 U. S., p. 223), known as the "Import" case.

In Harris vs. Cockermouth, etc., Ry., 1 Nev. & Mac., pp. 97–108, decided in 1858, the Court held it to be an undue preference for a railway company to concede to the owner of a colliery a lower rate than to the owners of other collieries *between the same*

points of departure and arrival, merely because the person favored had *threatened* to build a railway for his coal, and to divert his traffic from the railway.

I have heretofore said in Sections XLII. and XLIV., *that where the points of departure and arrival are the same*, whatever rates are conceded to one person, must be conceded to all persons shipping the same description of goods between those points; because, in such a case, it is impossible for there to be any difference in the circumstances or conditions of the different shipments *as affected by competition*. But, where either the points of departure or arrival are different, there may be a substantial dissimilarity in the circumstances and conditions, *as affected by competition*.

The distinction for which I contend is clearly recognized in the case last cited.

Cockburn, C. J., said:

"I quite agree that this Court has intimated, if not absolutely decided, that a company is entitled to take into consideration ANY circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic." . . . . "As, for instance, in respect of *terminal* traffic, *there might be competition with another railway;* and in respect to terminal traffic as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line."

1 Nev. & Mac., pp. 102, 103.

And Crowder, J., said:

"So, also, as my Lord has put it, *there are many cases* in which a company may be justified *in making a difference between the rate charged for the conveyance of goods taken from one end of the line to the other*, and the rate charged for the conveyance of goods taken to an intermediate point between the termini."

1 Nev. & Mac., p. 107.

The case of Harris vs. Cockermouth, etc., Ry. was cited by this Court in T. & P. Ry. vs. I. C. C., 162 U. S., pp. 223, 224, known as the "Import" case, and the distinction recognized by Cockburn, C. J., was quoted by this Court. 162 U. S., p. 224.

In the case of Ransome vs. E. C. Ry. Co., 1 Nev. & Mac., p. 120, decided in 1858, Crowder, Judge, said:

"There are MANY circumstances which may induce a railway company to charge, on parts of their line, rates which leave little or no remuneration, *as the proximity of rivers, or canals, or other lines of railway, which may enter into competition with them and materially affect their interests.*"

The case of Budd vs. L. & N. W. R. R. was decided June 18, 1877. 4 Eng. Ry. and Canal Traffic cases, 393, Brown & Macnamara.

It may be relied upon by counsel for the Appellant, as an authority directly in point.

The plaintiffs were the proprietors of iron and tin-plate works, situate near defendant's railway, and about twelve miles from Swansea. The defendant charged plaintiffs higher rates on plaintiffs' traffic to Liverpool, than were charged by defendant upon similar traffic to other manufacturers whose works were situated *within a radius of six miles of Swansea.*

There was communication by sea between Swansea and Liverpool; and defendant's rate (from Swansea) was fixed to enable defendant to compete with the sea carriage. pp. 394, 395.

Chief Baron Kelly was of opinion that the defendant's conduct amounted to an undue preference and advantage to the manufacturers *within the six miles radius* of Swansea. He said that he thought the Budd case was "identical in principle with Evershed vs. London & Northwestern Ry. Co."

Barons Cleasby and Huddleston also rested their decisions entirely upon the Evershed case. pp. 396, 397.

I have heretofore shown in section XLIV. that in the Evershed case, the Railway Company discriminated between persons *shipping from the same point of departure*, (Burton-upon-Trent), *to the same points of arrival.*

The Budd case could not be "identical in principle" with the Evershed case, unless the plaintiff's works, in the Budd case, were, in the opinion of the Court, entitled to be considered *as within the Swansea District*, notwithstanding they were twelve miles distant from the *town of Swansea.*

The defendant Railway Company seems to have arbitrarily created "a District" or "Group" at Swansea, with a radius of six miles; and no reason was shown why the radius was not made twelve miles instead of six. If the radius had been twelve miles, the plaintiff's works would have been included within the Swansea "District" or "Group," and would have been entitled to the same rates as similar works situated within that District.

If plaintiff's works had been included within the Swansea "District" or "Group," the Budd case would have been "identical in principle" with the Evershed case; because the shipments would have all been made *from the same point of departure* (i. e., the Swansea District or Group), *to the same point of arrival* (i. e., Liverpool); and, therefore, all of the shipments from that District or Group would have been entitled to the same rates.

There is reason to believe that the Court, in Budd's case, was of opinion that the plaintiff's works were entitled to be considered as within the Swansea District or Group; for Kelly, C. B., remarked that "a manufacturer who happened to be half a mile within the (six miles) radius, would be preferred to one immediately without." p. 396.

In the case of the Liverpool Corn Traders' Association vs. L. & N. W. Ry. Co., 7 Ry. & Canal Traffic cases, on p. 135, it was said that the Budd case is in conflict with the subseqent Scotch case of Murray vs. G. & S. W. Ry. Co., and with the case of the Denaby Main Colliery Co. vs. M. S. & L. Ry. Co., on the point that an action will not lie to recover overcharges made in violation of the Act of 1854, against undue preference; and on page 142 this language was used: "Budd's case was cited with the view *that a desire to compete would not justify a preference;* but the doubts to which that case is subject, make it *very inconclusive as authority.*"

The Court of Appeals, in 1892, stated that it was unable to agree with the Budd case, if it involves the proposition that competition cannot be taken into account at all.

Law Rep., 1892; 2 Q. B., 248; Phipps vs. L. & N. W. Ry. Co.

In the case of T. & P. Ry., vs. I. C. C., 162 U. S. 224, known as the "Import" case, this Court said that the Budd case has been "much modified if not fully overruled by the later cases,"

In March, 1892, the English Court of Appeal decided the case of the Executors, etc., of Pickering Phipps vs. L. & N. W. Ry. Law Rep., 1892; 2 Q. B., p. 229.

The late Pickering Phipps was the owner of iron furnaces, which were situated at Duston, on the line of the London & Northwestern Ry., at a distance of about sixty miles east from Great Bridge, one of the pig-iron markets.

There were iron furnaces (not owned by Phipps) situated at Butlins, and at Islip, which were also on the L. & N. W. Ry. They were east of Duston, and therefore more distant than Duston, from Great Bridge. Butlins was seventy-one miles, and Islip eighty-two miles, east of Great Bridge.

Duston was dependent for its railway carriage on the L. & N. W. Ry. alone; but Butlins and Islip both had access, not only to the L. & N. W. Ry., but also to the Midland Ry.

The L. & N. W. Ry. had, for charging purposes, grouped Butlins and Islip together; and, although it carried the Islip pig iron eleven miles further than the Butlins pig iron, it made the same charge from both places. The Midland Ry. also charged the same rate, and the same total charge per ton, for the carriage from Butlins and Islip.

The L. & N. W. Ry., which carried the Butlins pig iron eleven miles further, and the Islip pig iron twenty-two miles further than the Duston pig iron, charged Butlins 95-100 of a penny per ton, per mile, and Islip 84-100 of a penny per ton, per mile, while it charged Duston 1.5-100 of a penny per ton, per mile; so that the total charge per ton of pig iron from Duston to the western market was 5s 2d, while the total charge per ton from either Butlins or Islip was 5s 8d for the same class of merchandise. The executors of Phipps complained to the English Railway Commissioners that to charge for the carriage of pig iron from Butlins and Islip to the market, only 6d more than for the carriage from Duston, was, having regard to the difference of distance, an undue preference by the L. & N. W. Ry. as compared with Duston; and the complaint was based on the second section of the Railway and Canal Traffic Act of 1854, which prohibits "any undue or unreasonable preference or advantage to or in favor of any particular person or company or any particular description of traffic." pp. 229, 230, 231.

The L. & N. W. Ry. claimed that the comparatively lower rates charged to Butlins and Islip were forced upon it by the competition of the Midland Ry. p. 231.

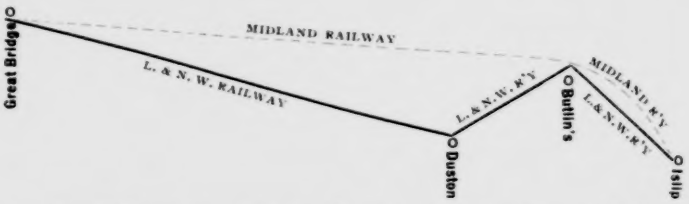
The English Railway Commissioners held that the L. & N. W. Ry., in fixing the rates in question, *was entitled to take into account the circumstances that Butlins and Islip had access to another line of railway which was in competition with its own*, and that no sufficient case of undue preference had been made out against it. pp. 231, 232.

The executors of Phipps appealed, and the decision of the Commissioners was affirmed.

Lord Herschell, in the course of his opinion, used this language:

"I cannot but think that *a lower rate which is charged from a more distant point by reason of a competitive route which exists thence, is one of the circumstances which may be taken into account* under those provisions, and which would fall within the terms of this enactment (Act of 1888, section 2, subsection 27), quite as much as the case to which I have called attention. Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, *it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition, would be prejudiced by any such proceedings.* And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices. Therefore it seems to me that, *whether you look at the Act of* 1854, *by itself*, or whether you look at it in connection with the provisions of subsection 2 of section 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of *competing routes*." p. 245.

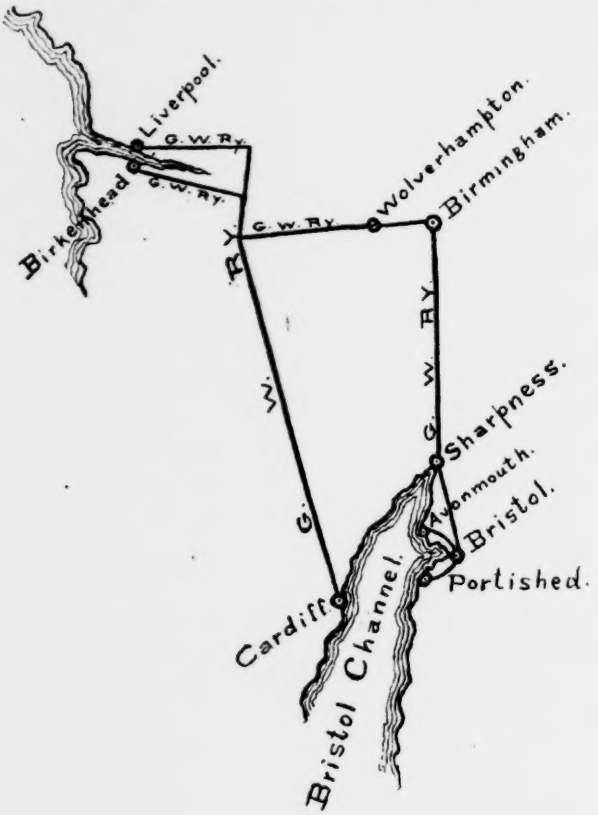
The following diagram sufficiently illustrates the competitive situation in that case:



The Phipps case was cited approvingly, and quoted from by this Court, in T. & P. Ry. vs. I. C. C., 162 U. S., p. 224-230; also by the Sixth Circuit Court of Appeals, in D. G. H. & M. Ry. vs. I. C. C., 74 Fed. Rep., p. 817; also by the Circuit Court for the Middle District of Tennessee, in I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep., pp. 420–423; also by the Circuit Court of Appeals in this case (Trans. p. 416); also, in Liverpool Corn Traders' Association vs. G. W. Ry. Co., 8 Ry. & Can. Traf. Cases, pp. 127–145.

The case of the Liverpool Corn Traders' Association vs. G. W. Ry. Co., 8 Ry. & Can. Traf. Cases, p. 114, was decided by the English Railway and Canal Commissioners in 1892; and their decision was affirmed by the Court of Appeal.

The following diagram sufficiently shows such of the lines of the Great Western Railway as were involved in that case:



Liverpool and Birkenhead are at the mouth of the Mersey, and on opposite sides of that river. They are connected with Wolverhampton and Birmingham, by the Great Western Railway, by other railways, and by a canal. Sharpness, Bristol, Avonmouth, Portishead and Cardiff are on the Bristol channel, and the Severn River; and are designated as the "Western Ports." They are connected with Wolverhampton and Birmingham by the Great Western Railway, by the Midland Railway, and by a canal.

The complaint was that the rates of the Great Western Railway on grain and flour to Wolverhampton and Birmingham, in the interior, are lower from Sharpness and the other "Western Ports," than they are from Birkenhead, and Liverpool; and that they amount to an undue preference.

The complaint was dismissed.

Wills, J., said that the rates of the Great Western Ry. from the "Western Ports" to the Midland markets (i. e., Wolverhampton and Birmingham), have been fixed with reference to an effective competition by the river and canal routes; that they have been established in the interest of said company, without any purpose of preferring one locality over the other; and that without them said company would lose the "Western" traffic altogether; *that Parliament never intended that the natural competitions of trade between one district and another should be stifled, and the interests of the consumer subordinated to those of the manufacturer or the merchant.* "The markets of Birmingham and Wolverhampton are most important centres of distribution and of supply to a very large area. The articles in question are of primary necessity. To destroy the competition between the 'Western Ports' and Liverpool would be to place the Midland markets more or less at the mercy of Liverpool, and greatly to aggravate the consequence of those disturbances of trade which are continually taking place, whether by failure of supply from which Liverpool draws its corn and grain, by difficulties in the labor market, either in the port or on the railway system, or by any of the innumerable and unforeseen circumstances which from time to time derange or cripple the trade of a particular market."

8 Ry. & Can. Traf. Cases, pp. 119, 120.

The English Railway & Canal Traffic Act, 1888, sec. 27, subsec. 2, provides that no railway company shall make, nor shall the Commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of home and foreign merchandise, in respect of the same, or similar services.

In the case of the Mansion House Association, etc., vs. The London & South-Western Ry. Co. Law Rep., 1895, 1 Q. B., p. 927, it was held that the effect of said proviso is not to prohibit all inequalities as between home and foreign merchandise, but that if the railway company proves facts which would justify admitted

differences, had the goods in both cases been home goods, the company are not debarred from relying on those facts merely because the goods which receive the benefit of the difference are of foreign origin. p. 927.

In that case, the complaint was that the defendant company gave an undue preference by charging lower rates on foreign merchandise, than on home merchandise from Southhampton to London; and Collins, J., held that it would be open to the company to justify "by urging all those topics *which have been recognized by many decisions*, and are recognized by sub section 2, such as difference of conditions reducing the cost and increasing the profit of the company, *the existence of competition by land or water from Southampton to London*," etc. p. 932.

Again, he said:

"I think the object of the section was to level differences, not to create arbritrary inequalities between the treatment of home and foreign merchandise; and *I can see no reason or principle in leaving out of account the fact of a rival route by rail or water* from the point of departure in this country to the point of arrival, in the case of goods coming from abroad, and taking it into account *as it clearly may be taken into account, where the comparison is between home goods only.*" p. 935.

The case of Mansion House Association, etc., vs. L. & N. W. Ry. Co., was cited approvingly, and quoted from, by the U. S. Circuit Court for the Middle District of Tennessee, in I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep., pp. 423, 424.

LI.

American Cases on Undue Preference.

The Constitution of Colorado provides that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

The Atchison, Topeka & Santa Fe R. R. Co. (hereinafter called the "Atchison" R. R. Co.) operated a railroad from Kansas City to Pueblo, about 634 miles. When its line first reached Pueblo, it had no connection of its own with Denver. The Denver & Rio Grande R. R. (hereinafter called the "Rio Grande" R. R.) was built and running between Denver and Pueblo; but the guage of its track was different from that of the "Atchison" R. R. Other companies, occupying different routes, had, at the time, substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The "Atchison" R. R. Co., being desirous of competing for this business, entered into an arrangement, as early as 1879, with the "Rio Grande" R. R. Co., for the formation of a through line of transportation for that purpose.

By this arrangement, a third rail was to be put down on the track of the "Rio Grande" road, so as to admit of the passage of cars continuously over both roads; and terms were agreed upon for doing business, and for the division of rates. The object of the parties was to establish a new line, which could be worked with rapidity and economy, in competition with the old ones. In the division of rates, the "Rio Grande" Company was allowed compensation at the rate of a mile and a half, for every mile of actual haul.

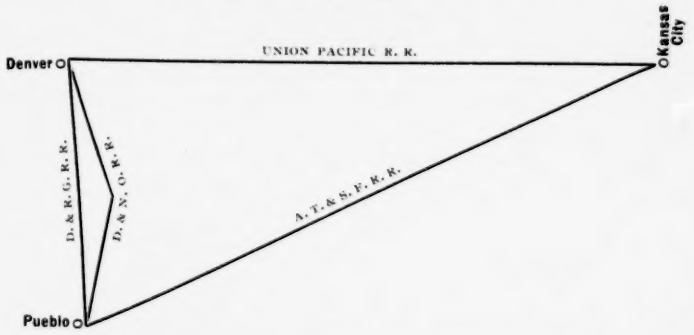
As the distance from the Missouri River to Pueblo by this route was about the same as to Denver by the competing routes, the through rates over this line to and from Denver, were usually

made about the same as rates to and from Pueblo. This was necessary to compete with other lines for Denver business. Afterward, an agreement was made between the "Atchison" R. R. Co. and its competitors, by which rates were established between Denver and the Missouri River, and arrangements made for a division of business among those companies, and for the regulation of their conduct toward each other, with a view to avoiding competition between themselves or from others.

In 1882 the Denver & New Orleans R. R. Co. (hereinafter called the "New Orleans" R. R. Co.) completed its road between Denver and Pueblo, and requested of the "Atchison" R. R. Co. that it be placed upon an equal footing with the "Rio Grande" R. R. Co. in all traffic over the "Atchison" R. R., for which the "New Orleans" R. R. Co. and the "Rio Grande" R. R. Co. were competitors.

This request was refused, and the "Atchison" R. R. Co. continued its through business with the "Rio Grande" R. R. Co. as before, and declined to deliver freight or passengers at the junction of the "New Orleans" R. R., or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from, or destined for that line, were taken or delivered at the regular depot of the "Atchison" Company in Pueblo, *and the prices charged were according to the regular rates to and from that point, which were more than the "Atchison" Company received on a division of through rates to and from Denver under its arrangements with the "Rio Grande" Company.*

The competitive situation at Denver, and Pueblo, is sufficiently shown by the following diagram:



The "New Orleans" Company filed a bill against the "Atchison" Company; the general purpose of which was to compel the "Atchison" Company to unite with the "New Orleans" Company, in forming a through line of railroad transportation to and from Denver over the "New Orleans" road, with all the privileges as to exchange of business, *division of rates*, sale of tickets, issue of bills of lading, checking of baggage, etc., that were, or might be granted to the "Rio Grande" R. R. Co., or to any other railroad company competing with the "New Orleans" Company for Denver business. 110 U. S., 668, 669, 670, 671, A., T. & S. F. Ry. vs. D. & N. O. Ry.

This Court, while holding that "both by the common law, and by the Constitution of Colorado, a railroad company is prohibited from discriminating unreasonably in favor of, or against another company seeking to do business on its road" (p. 682), said that it did not follow that a company "must under all circumstances give one connecting road the same facilities, and the *same rates* that it does to another, with which it has entered into contract relations for a continuous through line, and arranged facilities accordingly." (p. 685.) And as to the rates insisted upon by the "New Orleans" Company, the Court used this language (pp. 683 and 684): "That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable, the prices charged for business coming from, or going to, other roads connecting at Pueblo, may be

taken into consideration. But the relation of the 'New Orleans' Company to the 'Atchison' Company *is that of a Pueblo customer*, and it does not necessarily follow that the price which the 'Atchison' Company gets for transporting to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of discrimination against the 'New Orleans' Company in respect to the regular Pueblo rates, *neither is there anything, except the through rates, to show that the local rates are too high.*

"The bill does not seek to reduce the local rates, but only to get their company put in the same position as the 'Rio Grande' Company, on a division of through rates. This cannot be done until it is shown that the relative situation of the two companies with the 'Atchison' Company, both as to the kind of service, *and as to the conditions under which it is to be performed, are substantially the same*, so that what is reasonable for the one must necessarily be reasonable for the other.

"When a business connection shall be established between the 'New Orleans' Company and the 'Atchison' Company at their junction, and a continuous line formed, different questions may arise; but so long as it is now, we cannot say that, as a matter of law, the prices charged by the 'Atchison' Company for the transportation of persons and property coming from or going to the 'New Orleans' road, must necessarily be the same as are fixed for the continuous line over the 'Rio Grande' Railroad."

I submit that the opinion of the Court, in effect, establishes the following propositions:

First: That in order to meet competition, two or more railroad companies may, by voluntary agreement, form a joint through line, and that the joint through rate charged over such line may be less than the sum of the locals, or of the separate through rates of the roads forming the line.

Second: That the proportion of the joint through rate which each of the companies receives, may lawfully be less than the

local rates, or less than separate through rates charged by such company at the time, for transportation over the entire length of its own road; and

Third: That freight transported by such joint through line between two competitive points is not carried *under substantially the same circumstances and conditions* as other freight transported by it passing between one of said competitive points, and a point which is not competitive, notwithstanding the freight in both cases may be carried in the same cars, and in the same trains.

In other words, notwithstanding the *service rendered by a company* may be the same in both cases, *so far as the cost of transportation is concerned*, the fact of *competition* in the one case, and not in the other, creates *a substantial dissimilarity in the circumstances and conditions of the transportation.* And that is precisely the point for which the Appellees in this case are now contending.

I submit that the case, in effect, establishes:

First: That in order to meet competition at Montgomery, the Alabama Midland Ry. Co. and its connections have the right to form a joint through line from New York to Montgomery; and that the joint through rate from New York to Montgomery may, lawfully, be less than the sum of the locals, or of the separate through rates of those roads.

Second: That the proportion of the joint through rate, from New York to Montgomery, which is received by the Alabama Midland Ry., may, lawfully, be less than the separate through rate charged by said road for transportation from Bainbridge to Montgomery.

Third: *That freight transported between the competitive points, New York and Montgomery, is not transported under substantially similar circumstances and conditions as freight transported from New York to Troy*, a non-competitive local station on the Alabama Midland Ry.; and the fact that both shipments may be transported from Bainbridge to Troy, by the Alabama Midland Ry., in the same cars, and trains, is a matter of no consequence.

The case of A. T. & S. F. R. R. Co. vs. D. & N. O. R. R. Co. is cited, and quoted from, by this Court in T. & P. Ry. vs. I. C. C., 162 U. S., 230, 231, known as the "Import" case.

The sixth section of the Act of Congress, passed July 1, 1862, relative to the Union Pacific R. R. Co., provides that the Government shall at all times have the preference in the use of the railroad "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties *for the same kind of service.*"

104 U. S., 663, U. P. R. R. vs. U. S.

In a case between the same parties, reported in 117 U. S., 362, it appeared that the company's uniform rate for the transportation of passengers between Council Bluffs and Ogden, when passengers purchased tickets at either of those places, was $78.50 each; but, by contracts with connecting railroad companies who sold joint through tickets at reduced rates from New York, San Francisco, and other places over their own, and the Union Pacific R. R., the latter company received, as its proportion of the joint through tickets, only $54 for each joint through passenger, carried between Council Bluffs and Ogden. Of course, the reduced rates, at which the joint through tickets were sold, were the result of competition by other lines, at the points between which the joint through tickets were sold.

The contention on the part of the United States (p. 363) was, that passengers carried on its account between Council Bluffs and Ogden, should be carried at the same rates, as were charged for joint through passengers passing between those points as part of the journey over the entire joint through line; and the question of law involved in that contention, as stated by this Court, was, "whether the service rendered in transporting a local passenger between the two points is, in law, identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line;" and this Court held that the service in the two cases was not identical.

It does not appear in the report, but it was doubtless the fact, that the local passengers were carried by the Union Pacific R. R. in the same trains, and in the same class of cars, as the joint

through passengers. Or, in other words, that the *service* rendered by the company was precisely the same, *so far as cost, risk, etc., were concerned*, in the case of a joint through passenger, as in the case of a local passenger; and the only reason why the transportation of the joint through passenger was not done *under substantially similar circumstances and conditions*, as the transportation of the local passenger was, *that in the former case, competition controlled the rate for transportation, while in the latter it did not.*

The case of the U. P. R. R. vs. U. S., 117 U. S., 362, was cited by this Court in T. & P. Ry. vs. I. C. C., 162 U. S., 231, known as the "Import" case.

In the case of Ragan & Buffet vs. Aiken, 9th Lea (Tenn.), 619, it appeared that the defendant was the owner of a railroad about fifteen miles long, running from Rogersville to a junction with the E. T., V. & G. R. R. The complainants were merchants at Rogersville, and they alleged that they had been required by the defendant to pay freight at a rate of from twenty to twenty-five cents per hundred pounds; the gross amount of their payments aggregating about four thousand dollars; that the defendant, as an inducement to other merchants in Lee County, Va., and Hancock County, Tenn., to have their goods shipped to Rogersville, over defendant's railroad, instead of by other routes, had entered into contracts not to charge them exceeding fifteen cents per hundred pounds on similar freights; and complainants insisted that such discrimination was illegal. The Supreme Court of Tennessee (p. 622) said: "That in determining whether a company has given an *undue preference* to a particular person, the court may look to the interests of the company." The Court further said that: "If the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to *as to all persons in like condition*, it may nevertheless lower the charge of another person, *if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason.* It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and *in the same condition.* His object was to get business for his road from persons at a distance from its terminus, *which otherwise would reach its destination by a different route.* Under these cir

cumstances we cannot see that the contracts complained of are against public policy, or that complainants have been damaged, if the charges on their goods were reasonable."

It is submitted that the case last cited is a direct authority for the position, that competitive traffic is not "in the same condition" as traffic which is not competitive; and that the fact that a carrier is forced to accept less rates between competitive points, than it can afford to accept between non-competitive points, does not constitute an undue preference of the competitive points.

In the case of the Interstate Commerce Commission vs. B. & O. R. R. Co., 43 Fed. Rep., 50, 51, Judge Jackson said: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced, the Act to regulate commerce leaves common carriers as they were at common law, free to make special contracts *looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce*, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services?" See pp. 50, 51.

Again, as regards the "undue preference" branch of the English Acts, Judge Jackson quotes from the Report of the English Amalgamation Committee of 1872, p. 13, as follows: "The effect of the (English) decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, *from imposing such conditions as may incidentally have the effect of favoring one class of traders, or one town, or one portion of their traffc*, provided the conditions are the same to all persons, and are such as to lead to the conclusion that they are really imposed for the benefit of the railway company." See p. 53.

Again: Judge Jackson said, that the English cases "establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the *convenience of the public*, the fair interests of the carrier, *the relative quantities or volume of the traffic involved*, the relative cost of the services and profit to the company, *and the situation and circumstances of the respective customers with reference to each other as* COMPETITIVE *or otherwise.*" See pp. 53 and 54.

The decision of Judge Jackson in the case of the Interstate Commerce Commission vs. B. & O. R. R. Co. (43 Fed. Rep., p. 49) was affirmed by this Court. 145 U. S., p. 263.

Mr. Justice Brown, speaking for this Court, said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable. p. 276. . . . Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust." p. 277.

Again, speaking of the sale of a ticket for a number of passengers at a less rate than for a single passenger, he said: "It does not operate to the prejudice of the single passenger, *who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he.* If it operates injuriously to any one it is the rival road, which has not adopted corresponding rates; but, as before observed, *it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another.* p. 281. . . If these tickets were withdrawn *the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing.* p. 281. The language of Judge Jackson was quoted approvingly by this Court, in T. & P. Ry. vs. I. C. C., 162 U. S., pp. 232, 233, known as the "Import" case; and by the Circuit Court for the Middle District of Tennessee, in I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep., p. 426.

LII.

Such Advantages as Montgomery May Enjoy Over Troy Result From Causes Over Which the Appellee Railroad Companies Have no Control.

The Act to Regulate Commerce declares it to be unlawful *for any common carrier* subject to the Act, "to make or give any undue or unreasonable preference or advantage to any particular . . . locality or any particular description of traffic," etc.

The Act does not hold a common carrier responsible for any preference or advantage however great it may be, unless it be occasioned *by some wrongful act of the carrier.*

As between Montgomery and Troy, it must be remembered that Montgomery possessed great natural advantages over Troy, before any of the railroads involved in this controversy were dreamed of.

Before the Alabama Midland Railway was built, freight from New York was carried by ocean to Mobile, and thence by the Alabama River to Montgomery. From Montgomery it was doubtless hauled in wagons to Troy, 52 miles, at a wagon rate that was very much higher than the present railroad rate.

We see, that in those early days, the "preference or advantage" in favor of Montgomery, or the "discrimination" against Troy was much greater than it is now. But as the "preference or advantage" in favor of Montgomery, or the "discrimination" against Troy, in those days, was manifestly, the act of God, no one ever assumed to characterize it as "undue," or "unjust." The "preference" or "advantage" which Montgomery then enjoyed over Troy, instead of being denounced as "undue or unreasonable," was recognized as justly due to Montgomery, on account of her natural advantage of location; and every one regarded it as perfectly "reasonable" that she should enjoy the blessings which God had given her.

When the Alabama Midland Railway was constructed from Montgomery to Troy, that company *recognized* the "preference or advantage" which the Almighty had shown to Montgomery; but so far from doing anything to increase the "prejudice or

disadvantage," under which Troy then labored, the company reduced the rate from Montgomery to Troy, by the difference between wagon rates and rail rates.

The completion of the Alabama Midland Railway, through Troy to Montgomery, had the effect to change the *relative* geographical relation which had previously existed between Troy and Montgomery with respect to New York; so that Troy became geographically nearer than Montgomery to New York. And, had there been nothing else in the case, Troy would have become equitably entitled to lower rates than Montgomery.

The *geographical* relation now existing between Troy and Montgomery with respect to New York, is of no consequence, *so long as* Montgomery *can use* the Alabama River and the ocean, and the various part water and part rail lines and the all-rail lines which center there, but which do not reach Troy. The question is one of *strategical* rather than of *geographical* relations; and Montgomery has a better *strategical* position than Troy can possibly attain.

If the Alabama Midland Railway and connections should raise the rates from New York to Montgomery so as to make them the same as the rates from New York to Troy, the result would be:

First: The Alabama Midland Railway and connections would be deprived of all the traffic which they have heretofore carried from New York to Montgomery.

Second: Montgomery and New York would be deprived of the Alabama Midland Railway and its connections as a competing line.

But in no event could the relative position of Troy, as compared with Montgomery, be in any way improved.

In the case of the Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., page 281, Mr. Justice Brown, in discussing what would be the effect of requiring the B. & O. R. R. Co. to withdraw the "party-rate" tickets from sale, said:

"If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing."

And so, in this case, if the Alabama Midland Railway and connections were ordered to raise the joint through rates from New York to Montgomery, to the rates now charged from New York to Troy, while they would lose a large amount of traffic, Troy "would gain absolutely nothing."

In considering the question of undue preference as between Montgomery and Troy, it must be borne in mind that while Troy has the advantage of being nearer than Montgomery to New York, Montgomery has the advantage of having the Alabama River and several part rail and part water lines, and several all-rail lines, from New York, none of which run to Troy. In the case of the Executors of Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., p. 242, the English Court of Appeals used this language:

"It is said that it is unfair to the trader who is nearer the market, that he should not enjoy the full benefit of the advantage to be derived from his geographical situation, at a point on the railway nearer the market, than his fellow-trader, who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed *that he has two competing routes*, is not as much a circumstance to be taken into consideration, as the geographical position of the other trader, who, though he has not *the advantage of competition*, is situated at a point on the line geographically nearer the market."

"Why the logical situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, *the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works*," p. 242.

The language copied from the Phipps case was quoted by this Court, in T. & P. Ry. vs. I. C. C., 162 U. S., p. 229, known as the "Import" case; and by the Circuit Court for the Middle District of Tennessee, in I. C. C. vs. L. & N. R. R. Co. 73 Fed. Rep. p. 422.

LIII.

The History of the Fourth Section of the Act to Regulate Commerce.

The English Railway Statutes, passed prior to the Act to Regulate Commerce, contain no provision similar to the 4th section of that Act.

On January 6, 1886, Hon. John H. Reagan introduced in the House of Representatives, H. R. 2412, known as the "Reagan Bill."

Cong. Rec., Vol. 17, p. 286.

On March 8, 1886, Mr. Reagan reported as a substitute for H. R. 2412, a bill known as H. R. 6657.

Cong. Rec., Vol. 17, p. 2196.

On January 18, 1886, Senator Cullom introduced in the Senate S. 1093, known as the "Cullom Bill."

Cong. Rec., Vol. 17, p. 698.

On February 16, 1886, Senator Cullom reported as a substitute for Senate Bill 1093, a bill known as S. 1532.

Cong. Rec., Vol. 17, p. 1464.

Senate Bill 1532 was debated, and amended, and passed the Senate on the 12th day of May, 1886.

Cong. Rec., Vol. 17, pp. 4396 to 4423.

The bill was debated, and amended, in the House. The result of the amendment by the House was, that all of Senate Bill 1532 was stricken out, except the enacting clause, and, in lieu thereof, House Bill 6657 was inserted.

Cong. Rec., Vol. 17, p. 7277. Remarks by Mr. Reagan.

The Senate refused to concur in the House amendment, and a Conference Committee was appointed. The Committee on Conference met, and recommended that the House recede from its amendment, and agree to the bill of the Senate, with an amendment thereto, in the nature of a substitute, and that the Senate agree to the same.

The Conference Bill was passed by the Senate January 14, 1887; it was passed by the House January 21, 1887; it was ap-

proved by the President February 4, 1887; and became what is now known as the "Act to Regulate Commerce."

The "Reagan Bill" contained no provision for the appointment of an Interstate Commerce Commission. The Commission was created by the "Cullom Bill."

The fourth section of the "Reagan Bill," H. R. 6657, was as follows:

"That it shall be unlawful for any person or persons engaged in the transportation of property as provided in the first section of this Act to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or handling the same, *for a shorter than for a longer distance, which includes the shorter distance, on any one railroad*; and the road of a corporation shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or lease by such corporation."

It will be noticed that where there was a similar amount and kind of property transported, and where the longer distance included the shorter distance, the fourth section of H. R. 6657 contained a prohibition against charging more for a shorter than for a longer distance, which was absolute and unconditional; and that no provision was made for relief by a commission.

As the "Reagan Bill," H. R. 6657, was rejected, it is evident that Congress did not intend to enact an absolute and unconditional prohibition against charging more for a shorter than for a longer distance, even where the longer distance included the shorter.

The long and short haul clause, as it originally appeared in the "Cullom Bill," S. 1532, was as follows:

"That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this Act for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure; *Provided, however*, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of pas-

sengers or property; and the Commission may from time to time make general rules covering exceptions to any such common carrier, in cases where there is competition by river, sea, canal, or lake exempting such designated common carrier in such special cases from the operation of this section of this Act; and when such exceptions shall have been made and published, they shall have like force and effect as though the same had been specified in this section."

It will be noticed that the prohibition against charging more for a shorter than for a longer distance, as it originally appeared, in the 4th section of the "Cullom Bill," S. 1532, was as absolute and unconditional as the prohibition contained in the 'Reagan Bill," H. R. 6657; and that the only material difference between them was, that under the 4th section of the "Cullom Bill," S. 1532, the carrier might obtain permission from the Commission to make the greater charge for the shorter distance. But, unless the carrier obtained such permission from the Commission, the prohibition against making a greater charge for a shorter distance was, for all practical purposes, as absolute and unconditional under the 4th section of the "Cullom Bill," S. 1532, as it was under the 4th section of the "Reagan Bill," H. R. 6657.

It may be argued that under the 4th section of the Act to Regulate Commerce, as finally passed, a carrier can *in no case* of competition lawfully charge more for a shorter than for a longer distance, unless he shall have previously obtained the permission of the Commission. The argument may be that even competition by water will not justify a carrier in making a greater charge for a shorter than for a longer distance, unless the permission of the Commission be previously obtained. *If such an argument be sound, it is very strange that Congress did not adopt the 4th section, as it originally appeared in the "Cullom Bill," S. 1532.*

LIV.

History of Fourth Section—Continued.

The long and short haul clause of the "Cullom Bill," S. 1532, as it passed the Senate, January 14th, 1887, was as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure or to the same point of arrival; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *provided, however*, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time make general rules exempting such designated common carrier in such special cases from the operation of this section of this Act; and when such exceptions shall have been made and published they shall, until changed by the Commission or by law, have like force and effect as though the same had been specified in this section."

It will be noticed that the words, "*under substantially similar circumstances and conditions*," were then introduced into the 4th section, for the first time.

Judge Cooley states that on May the 12th, 1886, a motion was made by Senator Camden to change the phraseology of the first part of the section, so that it should read, "of like kind of property under *substantially similar circumstances and conditions.*

1 I. C. C. Rep., p. 78, in re. L. & N. R. R. Co.

Senator Camden's motion on May 12, 1886, was to insert the words "for the transportation of passengers, or of the like kind of property subject to the provisions of this Act."

Senator Allison said that it seemed to him that the true amendment "would be, *to put in a substantial reference to the second section* of the bill;" and that it would be better to insert "'that it shall be unlawful to charge or receive any greater compensa-

tion in the aggregate for the transportation of passengers or property, *as provided by the second section of this Act,*' which clearly indicates the *conditions and circumstances*, etc., which will regulate the different classes."

Senator Harris announced that the Senator from West Virginia (Mr. Camden) was ready "to ask the unanimous consent of the Senate to withdraw the amendment he had heretofore offered, and to offer this, which is satisfactory to the Committee and also to the Senator from Rhode Island, who moved the amendment:—'of like kind of property *under substantially similar circumstances and conditions,' adopting the language of the second section* instead of the language adopted by the Senator from Rhode Island in his amendment."

It will be seen from the foregoing extracts from the proceedings of the Senate on May 12, 1886, that the words "*under substantially similar circumstances and conditions,*" as they appeared in the fourth section of the Act, when it passed the Senate, *were imported into that section from the second section of the Act.*

Judge Cooley refers to the fact that when the Senate Bill (S. 1532) went to the House of Representatives, with the fourth section containing the words "under substantially similar circumstances and conditions," the House Committee on Commerce proposed to substitute for it the "Reagan Bill," H. R. 6657, the fourth section of which contained an absolute and unconditional prohibition against charging more for a shorter than for a longer distance, and which section is quoted in full *ante*, Section LIII.

1 I. C. C. Rep., p. 76, *in re.* L. & N. R. R.

Judge Cooley refers to the fact that the Conference Committee of the two Houses reported the fourth section amended so as to read as it now stands; and he adds that:

"The work of the Conference Committee was very elaborately and carefully performed. The two bills which were referred to it presented very clearly the views which had prevailed in the two Houses respectively, on the general subject of relative charges on long and short haul traffic—the House view of an inflexible rule, forbidding absolutely the greater charge for the shorter haul, and the Senate view *that the rule should be subject to exceptions when the circumstances and conditions required it.* The Conference Committee accepted deliberately the Senate view, and presented it, in the report to the two houses. In the Senate the report, before adoption, was discussed, and what was proposed by it on this point of vital interest was very distinctly brought out and

made prominent; and in the House, where also the report was adopted, nothing which was said by any one indicated that the situation was otherwise understood.

"It is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House Bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the 4th section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, *leaving the door open for exceptions in certain cases*, and, among others, in cases where *the circumstances and conditions of the traffic were affected* BY THE ELEMENT OF COMPETITION, and where exceptions might be a necessity if the COMPETITION was to continue. And water competition was beyond doubt especially in view."

1 I. C. C. Rep., pp. 77, 78, *in re.* L. & N. R. R.

LV.

HISTORY OF FOURTH SECTION—CONTINUED.

As it may be argued that a carrier can in no case of competition, lawfully charge more for a shorter than for a longer distance, unless he shall have previously obtained the permission of the Commission, and as I insist that such an argument practically ignores the fact that Congress refused to pass the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, and, in lieu thereof, adopted from the 2d section of the Act the phrase "under substantially similar circumstances and conditions," I here print, for the convenience of the Court, the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, and the

4th section of the "Act to Regulate Commerce," as it was finally passed:

4TH SECTION OF THE "CULLOM BILL," S. 1532, AS IT ORIGINALLY APPEARED.

"That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this Act for a shorter than for a longer distance over the same line, in the same direction (and from the same original point of departure). Provided, however, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time (make general rules covering exceptions to any such common carrier, in cases where there is competion by river, sea, canal, or lake, exempting such designated common carrier in such special cases from the operation of this section of this Act; and when such exceptions shall have been made and published they shall have like force and effect as though the same had been specified in this section."

4TH SECTION OF THE ACT TO REGULATE COMMERCE, AS IT WAS FINALLY PASSED.

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or *of like kind of* property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, *the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance.* Provided, however, That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, *after investigation by the Commission*, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time *prescribe the extent to which such designated common carrier may be relieved* from the operation of this section of this Act."

The words in parentheses in the 4th section of the "Cullom Bill," S., 1532, as it originally appeared, were omitted from the 4th section of the Act, as it was finally passed; and the words italicised in the 4th section of the Act, as it finally passed, were not contained in the 4th section of the "Cullom Bill," S. 1532, as it originally appeared.

It will be noticed that the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, contained a prohibition against making a greater charge for the shorter distance, which was, for

all practical purposes, as absolute and unconditional as the prohibition contained in the "Reagan Bill," H. R. 6657; and that under the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, the carrier could, in no case, lawfully charge more for a shorter than for a longer distance, unless he had first obtained permission from the Commission to make the greater charge.

But when the 4th section of the Act, as finally passed, so restricted the prohibition, that it did not apply in any case *where the transportation was not conducted "under substantially similar circumstances and conditions,"* there was no longer any necessity for the carrier to apply to the Commission, where the circumstances and conditions were substantially *dis*similar.

Any other construction fails to give any effect whatever to the important phrase, "under substantially similar circumstances and conditions," and leaves the 4th section of the Act as if those words had never been used.

To make my contention somewhat more manifest, I print in parallel columns the material prohibitory words of the 4th section of the Act, as finally passed, omitting from the left column the phrase, "under substantially similar circumstances and conditions:"

WITHOUT THE PHRASE.	WITH THE PHRASE.
"It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property	"It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property *under substantially similar circumstances and conditions*
for a shorter than for a longer distance."	for a shorter than for a longer distance," etc.

In re. L. & N. R. R. Co., 1 I. C. C. Rep., p. 57, Judge Cooley, in speaking of the effect of the introduction into the 4th section of the phrase, "under substantially similar circumstances and conditions," said:

"That which the Act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid, the carrier is left at liberty to do, without permission of anyone."

"The charging or receiving the greater compensation for

the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, *since if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated.*"

This language of Judge Cooley was quoted approvingly by Judge Ross, in the case of I. C. C. vs. A. T. & S. F. R. R. Co., 50 Fed. Rep., pp. 300, 301. See also 56 Fed. Rep., p. 942., I. C. C. vs. C., N. O. & T. P. Ry. Co.; 69 Fed. Rep., pp. 230, 232, 233, I. C. C. vs. Ala. Midland Ry. Co.; 71 Fed. Rep., p. 839, Behlmer vs. L. & N. R. R. Co.

It is said by the Sixth Circuit Court of Appeals, that though the 4th section authorizes the carrier to apply to the Commission for leave to charge a less rate for a longer haul, "it does not prohibit a railroad company from charging a less rate for a longer haul, if it can justify that rate, *by showing that the circumstances and conditions are dissimilar;* whenever it is challenged before the Commission or in the courts." 74 Fed. Rep., p. 818, 819, D. G. H. & M. Ry. Co. vs. I. C. C.

LVI.

The Phrase, "Under Substantially Similar Circumstances and Conditions," as Used in the Second Section.

The second section provides:

"That if any common carrier subject to the provisions of this Act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

It will be noticed that the Act to Regulate Commerce contains no provision for an application to the Commission for relief against the *second* section.

Judge Cooley, after quoting the second section, said:

"Here it will be observed that the phrase is precisely the same (as in the fourth section), and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind. And in this section, as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege; its privilege, too, in respect of the very subject-matter with which section 4, where it is employed, has to do, namely, the charges for transportation service. It is not at all likely that Congress would deliberately, in the same Act, and when dealing with the same subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it, would be essentially different from what it was as used in another. But beyond question the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

1 I. C. C. Rep., pp. 59, 60, in re. L. & N. R. R. Co.

LVII.

The Meaning of the Words, "Similar Circumstances and Conditions," as Used in the Second and Fourth Sections.

This Court, in construing the second and third sections, said:

"In this connection we quote with approval from the opinion of Judge Jackson in the Court below: 'To come within the inhibition of said section, the differences must be made *under like conditions;* that is, there must be contemporaneous service in the transportation of like kinds of traffic *under substantially the same circumstances and conditions.* In respect to passenger traffic, *the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other,* and there must be found to exist *substantial identity* of SITUATION *and of service,* accompanied by irregularity and partiality, resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination.'"

145 U. S., p. 282, I. C. C. vs. B. & O. R. R.

In the same case at Circuit:

Judge Jackson said, that the English cases "establish the rule that in passing upon the question of undue or unreasonable preference, or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as *the convenience of the public, the fair interests of the carrier,* the relative quantities or volume of the traffic involved, the relative cost of the service and *profit to the company, and the* SITUATION *and circumstances of the respective customers with reference to each other as* COMPETITIVE *or otherwise.*"

43 Fed. Rep., pp. 53, 54, I. C. C. vs. B. & O. R. R. Co.

The paragraph last quoted from Judge Jackson's opinion was quoted by this Court in T. & P. Ry. vs. I. C. C., 162 U. S., p. 232.

If, as said by this Court in construing the second and third sections, the circumstances and conditions include those of "SITUATION" as well as of service; and if, as said by Judge Jackson, the situation and circumstances include those which are "*competitive,*" as well as those which are not; then, as said by Judge Cooley:

"It is not at all likely that Congress would deliberately,

in the same Act, and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect as used in one place upon the conduct of the parties who were to be regulated and controlled by it, would be essentially different from what it was as used in another.

1 I. C. C. Rep., 59; *in re.* L. & N. R. R. Co.

LVIII.

Competition is One of the Circumstances or Conditions Contemplated by the Fourth Section.

In the case of *ex parte Koehler*, decided July 4, 1887, 31 Fed. Rep., 319, Deady, Judge, said: "Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and conditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a non-competitive point, the effect of such discrimination is to build up one place, at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances are altogether different. The power of the corporation to make a rate, is limited by the necessities of the situation. *Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust.*"

"*Competition* may not be the only circumstance that makes the condition under which a long and short haul are performed substantially dissimilar; *but certainly it is the most obvious and effective one*, and must have been in the contemplation of Congress, in the passage of the Act." . . . .

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it

would be folly in the Legislature to prevent it, if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance, and a fair show, to make the most of his, or its opportunities, and leave the result to circumstances over which it has little, if any, control." p. 321.

Again, he said: "Congress must have contemplated that there might be such a difference in the circumstances attending a long and short haul as would justify such a charge,—as would make it necessary for a railway corporation, in the retention and acquisition of the business for which it is constructed and operated, to charge less for a long haul than a short one. Congress never intended to make of this Act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted." pp. 320, 321.

In the case of M. P. Ry, Co., decided June 21, 1887, 31 Fed. Rep., 862, Judge Pardee said: "That *competition*, the life of trade, cuts an important figure in the conditions and circumstances attendant upon transportation of property and passengers, cannot well be overlooked nor denied. Nor can it well be denied *that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions.*

In the case of *ex parte* Koehler, decided May 4, 1885, 23, Fed. Rep., p. 533, Judge Deady, in speaking of the discrimination which necessarily exists whenever a greater charge is made for a shorter than for a longer distance, said:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It

must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust. Nor can the shipper at the non-competing point, or over the short haul, complain, so long as his goods are carried at a reasonable rate. It is not the fault of the railway that the shipper, who does business at a competing point, has the advantage of it. It is a natural advantage which he (the local shipper) must submit to, unless the Legislature will undertake to equalize the matter, by prohibiting the carriage of goods by water for a less rate than by rail."

In *ex parte* Koehler, 25 Fed. Rep., p. 75, Judge Deady said: "While the State had the power to prevent a railway from discriminating between persons and places, for the sake of putting one up, and another down, or for any reason other than the real exigencies of its business, it could not prevent discrimination between places, *when it is the result of competition* with other lines or means of transportation, and practically thereby deprive a railway company of the right to do business, and render its property comparatively valueless."

It may be said that the three cases decided by Judge Deady were heard *ex parte*, and, probably, without argument; but the fact that Judge Deady, through his Receiver, had the management and operation of the Oregon and California Railway for several years, gives to his opinions a peculiar value, born of practical experience, in a field severely competitive, and entitles them to far more weight than if they had been the result of mere theoretical arguments.

In I. C. C. vs. A. T. & S. F. R. R. Co., 50 Fed. Rep., p. 306, Judge Ross said: "Wherever and whenever actual *competition* exists, the question the carrier has to deal with is not so much what is a fair rate for the service, or what the traffic will bear, but what rate can be got for the service as against the rate offered by the competitor."

In I. C. C. vs. C., N. O. & T. P. Ry. Co., 56 Fed. Rep., p. 943, Judge Newman, in considering the phrase, "under substantially similar circumstances and conditions," said "that *competition*,

generally speaking, must be considered in applying this phrase in any given case."

In this case at Circuit, 69 Fed. Rep., p. 231, Judge Bruce said: "Neither the Congress, in making the law, nor the courts, in construing the law, can fail to note the element of *competition* as it enters into the industrial life of the people; and perhaps in no department is it more important and controlling than in the carrying trade of the country. It could not have been the purpose of Congress to ignore, or even to regard with disfavor, the competing forces and interests, which, in many cases, result in so much benefit to so many classes of the people."

In Behlmer vs. L. & R. R. R. Co., 71 Fed. Rep., 840, Judge Simonton uses this language: "When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley, in the same case, answers this question:

'Among other things, in cases where the circumstances and conditions of the traffic were affected by the element of *competition* and where exceptions might be a necessity if the *competition* were to continue. And water *competition* was, beyond doubt, especially in view.'"

In I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep., p. 419, Judge Clark, holding the U. S. Circuit Court for the Middle District of Tennessee, said:

"It may therefore be accepted as the result of the cases in this country that the circumstance of *competition* is an element which must be considered, and the English cases are now full and clear upon the subject."

Again, he said (73 Fed. Rep., p. 424): "It thus appears beyond question, without further reference to the authorities, that, in every case where a difference in the rates between two points of shipments is the ground of complaint, a leading and important element in the determination of the question is that of *competition*, or want of competition."

In D. G. H. & M. Ry. Co. vs. I. C. C., 74 Fed. Rep., p. 835, Judge Hammond, speaking for the Sixth Circuit Court of Ap-

peals, used this language: "And there is not any doubt that whatever may have been thought heretofore on the point in England, now, the *competition* of rival lines is one of the circumstances that must be considered; not as controlling, but as an element along with others to justify the discrimination of which complaint is made."

In T. & P. Ry. Co. vs. I. C. C., 162 U. S., pp. 233, 234, known as the "Import" case, Mr. Justice Shiras, speaking for this Court, said: "That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports *as in the case of traffic originating within the limits of the United States, competition* that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

In the case of Foot vs. Utica & B. R. R., N. Y. Railway Commission, Rep. 1884, Vol. 1, p. 104, cited in 21 Am. & Eng. R. R. Cases, p. 63, the New York Railroad Commission used this language:

"If the price for carrying a certain distance is not unreasonable, and yet for a greater distance, for some reason, the same price cannot be obtained, should therefore the road give up the second price entirely? Is not half a loaf better than no bread? If such a result is *forced* upon a road, those at intermediate stations would surely, in some way, be obliged to make up the sum lost, and be worse off than before." . . . "Railroads, like other corporations or individuals, must sell what they have to sell, viz., transportation, for the best price they can get, provided it is not unreasonable in the sense of extortionate or prohibitive of the articles transported." . . . "Examples can be multiplied, but this single one shows that the cost of service is not alone to control, but that nature of the article, quantity of shipments, *conditions of competition*, season of year, value of service rendered, and many other elements must be considered."

During the fiscal year ending June 30, 1893, the revenue de-

rived by the Alabama Midland Ry. from non-competitive traffic amounted to $174,588.43; and the revenue derived from competitive traffic amounted to $152,862.33.

McLendon, Trans., p. 352.

If that railway, as a result of the decision in this case, shall be forced to abandon its competitive traffic, the local stations between Bainbridge and Troy will "surely, in some way, be obliged to make up the sum lost," or that railway will be compelled to carry its local traffic at less than reasonable rates.

LIX.

Water Competition.

The Commission, in all of its decisions, has conceded that *water* competition, or competition with *foreign* railroads, or competition with lines of railroad *wholly in a single State*, may make out the dissimilarity of circumstances and conditions in reference to the transportation of traffic, which will authorize a railroad company, without applying to the Commission, to charge less for the longer than for the shorter distance. (1 I. C. C. Rep., p. 3., in re. Louisville & Nashville R. R. Co.; 5 I. C. C. Rep., p. 607, Gerke Brewing Co. vs. L. & N. R. R. Co. et al.; 5 I. C. C. Rep., p. 387, Ga. R. R. Comm. vs. Clyde Steamship Co.)

Suppose A, B, C, to be an equilateral triangle; that each of the sides is 100 miles long; and that the line A B, B C, represents a railroad.

Now if the line A C be supposed to represent a navigable water course, the Commission concedes that the railroad A B, B C, may compete with the vessels upon the water course, without applying to the Commission, and without necessarily reducing it local rates; but if the line A C be supposed to be a rival railroad, which is not a foreign road, nor a road wholly within a

single State, then, if the road A B, B C, desires to compete with the road A C, it must, according to the Commission, reduce all of its local rates to the competitive rate prevailing between A and C, or it must apply to the Commission for relief from the 4th section.

What good reason can possible exist for such a distinction between water and rail competition? And what a good reason can possibly exist for the distinction between different kinds of railroads?

Water transportation is generally cheaper than railroad transportation, and therefore water competition generally forces lower competitive rates.

This, however, is a mere difference in degree; and is unimportant.

The important fact is, that a competitive rate must be met, whether it be made by water craft, or by railroad. It is the fact of competition, and not the kind of competition, that creates the substantial dissimilarity in the circumstances and conditions of transportation.

56 Fed. Rep., 944, I. C. C. vs. C., N. O. & T. P. Ry. Co.

One reason suggested for making the distinction between water and rail competition, is said to be that water competition is exempted from the operation of the Act to Regulate Commerce. But there is no *practical* force in the suggestion.

If we suppose the line A C, in the triangle referred to above, to represent a railroad 100 miles long, and the line A B, B C, to represent another railroad 200 miles long, and that both railroads are competing for traffic between A and C; the long line will be practically at the mercy of the short line, if the long line be compelled to reduce its local rates as a condition of its being allowed to meet the competitive rates of its rival. Because, even though the short line be also forced to reduce *its* local rates down to the level of the competitive rate, the loss sustained by it, in doing so, will be only one-half as great as the loss which it will inflict upon the long line, by forcing the latter to reduce its local rates. The illustration, of course, assumes that the volume of the local traffic of each line is in proportion to its mileage, and that the long line, if allowed to compete, can secure one-half of the competitive traffic.

In such a case, the long line is as completely at the mercy of the short line, as if the short line was not at all subject to the Act to Regulate Commerce.

If the Commission had the power to compel the short line A C to charge reasonably *high* competitive rates, so as to enable both lines to realize full compensation from their competitive traffic, there might have been some reason for drawing a distinction between water and rail competition.

It is possible that when the distinction was first made by the Commission, the Commission may have supposed that it had the power to compel railway companies to maintain reasonably *high* rates at competitive points.

But the Commission afterwards held that the word "reasonable," as used in the first section in reference to rates, means reasonably *low*, but *not* reasonably *high*. The Commission has also held that it has no power to order competitive rates to be advanced, even where they are so low "that persistence in making them would be ruinous."

2 I. C. C. Rep., p. 231; in re. C., St. P. & K. C. R. R.

If it be the law that one railroad subject to the Act cannot compete with another railroad subject to the Act, without reducing its local rates, and if the Commission has no power to compel a railroad to charge reasonably *high* competitive rates, then the long line is as completely at the mercy of the short line as if the short line were a navigable water-course; *and the short lines of railway will eventually secure a complete monopoly of all the competitive traffic of this country.*

If it be the law that nothing but *water* competion can be recognized, *the cities located upon the navigable water-courses will absorb the commerce of the country;* and the great interior railroad centers, such as Indianapolis, Birmingham, Atlanta, etc., must relapse into the condition of mere villages.

It is impossible to assume that Congress intended that such a construction should be placed upon the long and short haul clause, *as would give the monopoly of transportation to the short lines of railroads; and the monopoly of commerce to the cities located upon water-courses.*

In the case of the I. C. C. vs. B. & O. R. R. Co., this Court

said that the Act was NOT *designed* "*to prevent competition* BETWEEN DIFFERENT ROADS;" thus ignoring the distinction which the Commission has attempted to draw between competition by water, and competition by railroad. 145 U. S., pp. 276, 281.

It is competition that "affects rates" that is to be considered. 162 U. S., 233, T. & P. Ry. vs. I. C. C.

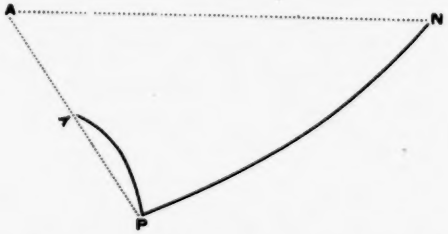
And rail competition "affects rates" as much as water competition.

LX.

PECULIAR (?) CASES OF RAILROAD COMPETITION.

In re. Louisville & Nashville R. R. Co., 1 I. C. C. Rep., p. 32, the Commission said, that even as between railroads which are subject to the Act, there might be *rare and peculiar* cases of competition, which would create the dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than the shorter haul.

One such case is referred to on page 81, and is sufficiently illustrated by the following diagram:



The Pennsylvania Railroad has a line running from Younsgtown (Y), via Pittsburgh (P), to New York (N), which line is 510 miles long. It is represented by the solid line in the diagram.

A competing railroad route (represented by the dotted line), runs from Pittsburgh, via Youngstown, to Ashtabula (A), and thence to New York, which line is 682 miles long. This line gives to the people of Pittsburgh and Youngstown competition with the Pennsylvania Railroad, in their business to and from New York and New England.

The Commission intimated that the competing line ought to be allowed to charge less from Pittsburgh than from Youngstown to New York, because the application of any other rule "must be fatal to competition." p. 82.

The only "*peculiarity* of the competition" in that case is "that the business on the roads respectively is started in opposite directions when destined to New York; so that on east-bound traffic from Pittsburgh, the haul by one road is shorter than from Youngstown, and longer by the other."

While it may be called a "peculiarity," in one sense, it furnishes no substantial reason for distinguishing that case from the ordinary case where a long line is seeking to compete with a shorter line.

The competing line, in that case, was 172 miles longer from Pittsburgh to New York than the Pennsylvania Railroad, and the competing line was asking to be allowed to compete at Pittsburgh, without being compelled to reduce its local rates from Youngstown. That was all there was in the case.

A similar necessity exists in every case where a long line is competing with a shorter line.

The only fact of any legal consequence, in any such case, is, that if long lines are not allowed to compete with short ones, except upon the condition of reducing their local revenue, the long lines cannot, and will not compete; and it is this fact that creates the substantial dissimilarity in circumstances and conditions, which takes a case out of the operation of the fourth section.

The Commission has recently overruled so much of the decision in re. Louisville & Nashville R. R. Co., as held that carriers were permitted to judge for themselves in the first instance of what constitutes "rare and peculiar cases of competition between railroads which are subject to the statute." But the principles laid down in that case in regard to *water* competition, competition with a *foreign road*, and competition with *a road wholly within a single State*, are reaffirmed.

5 I. C. C. Rep., 328, 387, Ga. R. R. Comm. vs. Clyde Steamship Co.

5 I. C. C. Rep., 607, Gerke Brew. Co. vs. L. & N. R. R.

Counsel for the appellant may disagree with the Commission even as to *water* competition, competition with a *foreign road*, and competition with *a road wholly within a single State.*

Counsel for the Appellant may take the broad ground, that no kind of competition, whether it be by water, or by rail, can differentiate the circumstances and conditions of transportation. His contention may be that the fourth section was intended to be a provision against any charge of a greater sum for a shorter distance, under circumstances that relate to the act of *carriage alone;* together with the relieving clause, which may be applied in the discretion of the Commission alone, on due application therefor.

The decision of the Commission in re. L. & N. R. R., holding that *water* competition, competition with a *foreign road*, competition *with a road wholly within a single State*, and "rare and peculiar cases of competition between railroads subject to the statute," may constitute a dissimilarity of circumstances and conditions, was rendered June 15, 1887 (1 I. C. C. Rep., 31); and it was adhered to by the Commission until about a month before the litigation in this case began, when the Commission, on June 11, 1892, overruled only so much of it as referred to "rare and peculiar cases of competition between railroads subject to the statute." 5 I. C. C. Rep., 327.

I submit that it is now quite too late for counsel to undertake to repudiate a principle which had been recognized for so long a time.

The Commission was right in its first decisions, as far as they went. Its only error was in not going far enough. It erred in attempting the impossible task of drawing a sound distinction between the different kinds of competition, as affecting rates.

LXI.

Rates from New York to Montgomery are Affected by Water Competition.

In Section X, I have shown that the Alabama River is navigable every month in the year by steamboats between Montgomery and Mobile. In Section XI, I have shown the number of steamboats which now navigate that river, and their tonnage. I have also shown that in the event rail-rates should be advanced from New York to Montgomery, all boats necessary to do the bulk of the business done at Montgomery could be obtained. I have shown in Section XII, that the effect of the navigability of that river is to keep down the rates charged by the railroad to so low a point that water transportation, which is the cheapest mode of transportation known, cannot successfully meet the present rail-rate. I have shown in Section XIII, that in former years traffic moved by ocean from New York to Mobile and thence by river to Montgomery in large quantities; and that it continued to move until the rail-rates were reduced so low that they could not be met by the water transportation lines. I have shown in Section XVI., that if the rates on class goods from New York to Montgomery were increased so as to be the same as the rates from New York to Troy, the traffic would return from the rail-lines, back to the water-lines.

I have shown that there are two water routes from New York to Montgomery; one of which is by ocean to Mobile, and thence by river to Montgomery; and the other by ocean to Savannah; thence by rail to Mobile, and thence by river to Montgomery.

T. H. Moore, Trans., p. 220.

But, while I have shown that the rates from New York to Montgomery are affected by water competition, I do not rely upon that fact alone. On the contrary, I insist that the rail competition between New York and Montgomery is entitled to as much consideration as the water competition.

LXII.

Competition of Controlling Force.

The Commission, in its report and opinion in this case, says that even water competition cannot be considered, unless it be actual and of controlling force in respect to traffic important in amount.

Trans., p. 57.

In the case of Raworth vs. N. P. R. R. Co., 5 I. C. C., Rep., 246, Commissioner Veasey, speaking for the Commission, said: "Competition has a potential existence in the sense in which we wish to be here understood, where the means of such competition exists, and all the conditions are such that it is morally certain an advance of rates by a carrier will result in developing competition of controlling force. If the facts make out a clear case of this kind, it would seem unreasonable to require the carrier to go further and demonstrate by an actual advance in rates, resulting in a loss for the time being of the traffic involved that such advance will so result."

The facts in this case show that a sufficient amount of tonnage could easily be obtained to carry the entire competitive traffic between New York and Montgomery.

LXIII.

The Order of the Commission in Reference to Rates on Phosphate Rock from South Carolina and Florida Fields to Montgomery.

The Commission ordered the defendants to charge "on shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid."

Trans., p. 69.

The Alabama Midland Railway and its connections not only participate in the carriage of class goods from New York and other Northeastern cities, to Montgomery; but they also participate in the carriage of phosphate rock from Charleston, and Port Royal, S. C., and from Gainesville, Fla., to Montgomery.

With reference to shipments of phosphate rock from the South Carolina and Florida fields to Troy, and through Troy to Montgomery, the Commisslon finds as a fact, and so reports, that the following constitute through lines, viz.:

Line No. 1, from Charleston to Montgomery: The Charleston & Savannah Ry., the Savannah, Florida & Western Ry., and the Alabama Midland Ry.
Trans., p. 55, right col.

Line No. 2, from Port Royal to Montgomery: The Port Royal & Augusta R. R. (Cen. R. R. of Ga.), the Charleston & Savannah Ry., the S. F. & W. Ry., and the Alabama Midland Ry.
Trans., p. 55, right col.

Line No. 3, from Gainesville to Montgomery: The S. F. & W. Ry., and the Alabama Midland Ry.
Trans., p. 55, right col.

Line No. 4, from Port Royal to Montgomery: The Ga. Cent. R. R.
Trans., p. 55, right col.

Line No. 5, from Charleston to Montgomery: The Charleston & Savannah Ry., and the Ga. Cent. R. R.
Trans., p. 55, right col.

Line No. 6, from Charleston to Montgomery: The South Car. R. R., the Ga. R. R., and the Ga. Cent. R. R.
Trans., p. 55, right col.

Line No. 7, from Gainesville to Montgomery: The S. F. & W. Ry., and the Ga. Cent. R. R.
Trans., p. 55, right col., and p. 56, left col.

Line No. 8, from Montgomery to Savannah: The Ga. Cent. R. R.
Trans., p. 56, left col.

Line No. 9, various lines from Charleston, Port Royal, Savannah and Gainesville to Atlanta, and thence via the Atlanta & West Point R. R., and the Western Ry. of Ala., to Montgomery.

Line No. 9, though not specifically mentioned by the Commission, is obvious from the map. Said lines are illustrated in Diagram No. 2, referred to in Section XXXI.

Of the nine rail lines, mentioned above in this section as running from the phosphate fields to Montgomery, the following

lines do not pass through Troy at all, viz.: Nos. 4, 5, 6, 7, 8 and 9; though all of them extend to Montgomery.

To say nothing of the potential competition by water from Charleston and Port Royal to Montgomery, I submit, upon the foregoing facts, that the rail competition at Montgomery is so dissimilar from the rail competition at Troy, with reference to the shipment of phosphate, as to fully justify the difference in the rates charged.

I submit, further, upon the foregoing facts, that competition at Montgomery, with reference to phosphate shipments, is such as "*affects rates*," *i. e.*, that the low rate charged from the phosphate fields to Montgomery by the Alabama Midland Railway and its connections is necessary to secure freight "*which would otherwise go by other competitive routes.*"

The question of *fact* as to whether the competition referred to is such as to "*affect rates*" has been settled by the decree of the Circuit Court, and the decree of the Circuit Court of Appeals; and this Court will not reverse on that question of fact, "unless it finds something in the record to make it its duty to draw a different conclusion."

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

The question of *law* as to whether competition that "*affects rates*" can be considered, has been settled by this Court in T. & P. Ry. Co. vs. I. C. C., known as the Import case.

162 U. S., 233, 234.

LXIV.

THE ORDER OF THE COMMISSION IN REFERENCE TO RATES ON COTTON FROM MONTGOMERY FOR EXPORT THROUGH THE ATLANTIC SEAPORTS — BRUNSWICK, SAVANNAH, CHARLESTON, WEST POINT, AND NORFOLK.

The Commission ordered the defendants to charge "on shipments of cotton from Troy aforesaid, for export, through the Atlantic seaports, to wit: Brunswick, Savannah, Charleston, West Point, or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid."

Trans., p. 69.

With reference to shipments of cotton from Montgomery to the ports of Brunswick, Savannah, Charleston, West Point, and Norfolk, the Commission finds as a fact, and so reports, that the following constitute through routes or lines, viz.:

Line No. 1, from Montgomery to Brunswick: The Alabam Midland Ry., the Savannah, Florida & Western Ry., and the Brunswick & Western Ry.
Trans., p. 56, left col.

Line No. 2, from Montgomery to Savannah: The Alabama Midland Ry., and the Savannah, Florida & Western Ry.
Trans., p. 56, left col.

Line No. 3, from Montgomery to Charleston: The Alabama Midland Ry., the Savannah, Florida & Western Ry., and the Charleston & Savannah Ry.
Trans., p. 56, left col.

Line No. 4, from Montgomery to West Point, Va.: The Western Railway of Alabam, the Atlanta & West Point R. R., and the Richmond & Danville R. R.
Trans., p. 56, left col.

Line No. 5, from Montgomery to West Point, Va.: The Alabama Midland Ry., the Savannah, Florida & Western Ry., the Charleston & Savannah Ry., the Northeastern Railroad of South Carolina, the Wilmington, Columbia & Augusta R. R., the Wilmington & Weldon R. R., the Petersburg R. R., the Rich. & Petersburg R. R., and the Richmond & Danville R. R.
Trans., p. 56, left col.

Line No. 6, from Montgomery to Norfolk: The Alabama Midland R. R., the Savannah, Florida & Western Ry., the Charleston & Savannah Ry., the Northeastern Railroad of South Carolina, the Wilmington & Weldon R. R., and the Seaboard & Roanoke R. R.
Trans., p. 56, left col.

Line No. 7, from Montgomery to Brunswick: The Georgia Central R. R., and the East Tennessee, Virginia & Georgia Ry.
Trans., p. 56, left col.

Line No. 8, from Montgomery to Savannah: The Georgia Central R. R.
Trans., p. 56, left col.

Line No. 9, from Montgomery to Charleston: The Georgia Central R. R., and the Charleston & Savannah R R.
Trans., p. 56, left col.

Line No. 10, from Montgomery to Charleston: The Georgia Central Railroad, the Georgia Railroad, and the South Carolina Railroad.
Trans., p. 56, left col.

Line No. 11, from Montgomery to West Point, Va.: The Georgia Central Railroad, and the Richmond & Danville Railroad.
Trans., p. 56, left col.

Line No. 12, from Montgomery to West Point, Va.: The Georgia Central Railroad, the Atlantic Coast Line, and the Richmond & Danville Railroad.
Trans., p. 56, left col.

Line No. 13, from Montgomery to Norfolk: The Georgia Central Railroad, and the Atlantic Coast Line.
Trans., p. 56, left col.

Line No. 14, from Montgomery to Norfolk: The Georgia Central Railroad and the Seaboard Air Line.
Trans., p. 56, left col.

Line No. 15, from Montgomery via the Alabama River to Mobile, thence by ocean to Brunswick, Savannah, Charleston, West Point, Va., and Norfolk. This line, while not mentioned by the Commission, is shown by the proof taken in the Circuit Court to be one of the most important factors in the problem.

Said lines are illustrated in diagram No. 2, referred to in Section XXX.

Of the fourteen rail lines, or rail and water lines mentioned above in this section, the following lines do not pass through Troy at all, viz.: Numbers 4, 7, 8, 9, 10, 11, 12, 13 and 14; though all of them extend from Montgomery to the Atlantic seacoast. And in addition to said rail lines, and rail and water lines, Montgomery has the all water line from Montgomery to Mobile by river, and thence by ocean direct to European ports, while Troy is fifty-two miles distant from the river.

I submit, upon the foregoing facts, that the competition at Montgomery is so dissimilar from the competition at Troy, with reference to cotton shipped to the Atlantic seacoast for export, as to fully justify the difference in the rates charged.

I submit, further, upon the foregoing facts, that competition at Montgomery, with reference to cotton shipped from Montgomery to the Atlantic seacoast for export, is such as "*affects rates*," *i. e.*, that the low rates charged from Montgomery to the Atlantic seacoast by the Alabama Midland Railway are necessary to secure freight "*which would otherwise go by other competitive routes.*"

The truth is, as made manifest by the testimony, that the river line from Montgomery to Mobile, and the ocean lines from Mobile to European ports, fix the maximum rates which can be charged by the rail lines from Montgomery to the Atlantic seacoast in connection with vessels sailing from the Atlantic seacoast for European ports; and if the rail lines should attempt to raise the rates from Montgomery to the Atlantic seacoast as high as the rates from Troy to the Atlantic seacoast, the cotton would all go from Montgomery by river to Mobile, and thence by ocean direct to Europe.

The result is, that unless the Alabama Midland Railway accepts the rates which it now charges from Montgomery to the Atlantic seacoast, the cotton intended for export will either go by the river and ocean direct to Europe, or it will go by some of the other rail lines, or rail and water lines from Montgomery to the Atlantic seacoast, and thence to Europe.

It must be apparent that the traffic manager of the Alabama Midland Railway (which is not making operating expenses) would not carry cotton from Montgomery through Troy, for less than he charges from Troy to the Atlantic seacoast, unless he was satisfied that the freight "*would otherwise go by other competitive routes.*"

The question of *fact* as to whether the competition referred to is such as to "*affect rates*," has been settled by the decree of the Circuit Court, and the decree of the Circuit Court of Appeals; and this Court will not reverse on that question of fact, "unless it finds something in the record to make it its duty to draw a different conclusion."

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

The question of *law* as to whether competition that "*affects rates*" can be considered, has been settled by this Court in T. & P. Ry. Co. vs. I. C. C., known as the Import case, 162 U. S., 233, 234.

LXV.

The Order of the Commission in Reference to Rates on Class Goods from Louisville, St. Louis, and Cincinnati, to Troy.

The Commission ordered the defendants to charge "on class goods shipped from Louisville, Ky.; St. Louis, Mo., or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Ga., and Eufaula, Ala."

Trans., p. 69.

Columbus, Ga., and Eufaula, Ala., are situated on the Chattahoochee River, which is navigable by steamboats from Columbus to the Gulf at Apalachicola, Fla.

The distance between Columbus and Eufaula, by river, is only about 100 miles; and as steamboats are constantly plying between Columbus and Eufaula, the rates from Louisville, St. Louis, and Cincinnati, to Eufaula, are necessarily the same as to Columbus. Troy is about 90 miles distant from the Chattahoochee River; and about 52 miles distant from the Alabama River at Montgomery. It has no water transportation.

If the object of the Commission was merely to equalize the rates to Troy, as compared with the rates to Columbus and Eufaula, it can be done either by decreasing the rates to Troy, or by increasing the rates to Columbus and Eufaula, so as to make them the same as the rates to Troy.

But the testimony tends to prove that if the rates from Louisville, St. Louis, and Cincinnati, to Columbus and Eufaula, be increased so as to make them as high as the rates to Troy, the traffic will be diverted from the rail lines to the Ohio and Mississippi Rivers, and that it will be carried by steamboats to New Orleans, thence by Gulf to Apalachicola, Fla., and thence by river to Eufaula and Columbus.

There are also various rail lines running from the Chattahoochee River to the Atlantic Ocean at Jacksonville, Fernandino, Brunswick, Savannah, and Charleston. Those rail lines connect with steamships, and sailing vessels for New York and other Northeastern cities.

Class goods are shipped from New York and other Northeastern cities, as well as from Louisville, St. Louis, and Cincinnati; and the rail lines reaching from Louisville, St. Louis, and Cincinnati to Columbus and Eufaula, meet very strong competition in the carriage of class goods, from the lines carrying class goods from New York and other Northeastern cities to Columbus and Eufaula.

The usual route for the transportation of class goods from New York and other Northeastern cities is by steamships to Savannah, or other south Atlantic ports, thence by rail, to Columbus and Eufaula, or by rail to some other crossing of the Chattahoochee River, and thence by steamboats to Eufaula and Columbus.

I submit upon the foregoing facts, that the competition at Columbus and Eufaula is so dissimilar from the competition at Troy as to fully justify the difference in the rates charged on class goods from Louisville, St. Louis, and Cincinnati.

I submit further, upon the foregoing facts, that competition at Columbus and Eufaula with reference to class goods, whether shipped from the East or from the West, is such as "*affects rates*," i. e., that the low rates charged by rail to Columbus and Eufaula are necessary "to secure freight," which "*would otherwise go by other competitive routes.*"

The question of fact as to whether the competition referred to is such as "*affects rates*" has been settled by the decree of of the Circuit Court, and the decree of the Circuit Court of Appeals; and this Court will not reverse "unless it finds something in the record to make it its duty to draw a different conclusion."

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

The question of law as to whether competition that "*affects rates*" can be considered, has been settled by this Court in T. & P. Ry. Co. vs. I. C. C., known as the Import case, 162 U. S., pp. 233, 234.

LXVI.

The Order of the Commission in Reference to Rates on Cotton from Troy to New Orleans.

The Commission ordered the defendants to charge "on shipments of cotton from Troy aforesaid, through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cts. per 100 lbs."

Trans., p. 69.

The rate of 50 cts. per 100 lbs. is the rate from Columbus, Ga., to New Orleans, on cotton.

Trans., p. 60, left col.

The present rate on cotton from Troy to New Orleans, is 68 cts. per 100 lbs., or 18 cts. per 100 lbs. higher than the rate from Columbus.

Trans., p. 59, right col.

If the object of the Commission was merely to equalize the rates from Troy and Columbus, to New Orleans, it can be done either by decreasing the rates from Troy, or by increasing the rates from Columbus and Eufaula (the rates from Eufaula being practically the same as the rates from Columbus), so as to make them same as the rates from Troy.

But the testimony shows that if the rates on cotton from Columbus and Eufaula to New Orleans were increased 18 cts. per 100 lbs. so as to make them as high as the rates from Troy to New Orleans, all of the cotton from Columbus and Eufaula would be shipped by steamboat down the Chattahoochee River to Apalachicola, and thence by vessel to Mobile or New Orleans.

I submit upon the foregoing facts that the competition at Columbus and Eufaula is so dissimilar from the competition at Troy, as to fully justify the difference in the rates charged on cotton from those points to New Orleans. I submit further, upon the foregoing facts, that competition at Columbus and Eufaula with reference to cotton destined to New Orleans, is such as "*affects rates*," *i. e.*, that the low rates charged on cotton from

Columbus and Eufaula to New Orleans by rail, are necessary to secure freight which would otherwise go by other competitive routes.

The question of *fact* as to whether the competition referred to is such as "*affects rates*," has been settled by the decree of the Circuit Court and the decree of the Circuit Court of Appeals; and this Court will not reverse "unless it finds something in the record to make it its duty to draw a different conclusion."

162 U. S., 194, C., N. O. & T. P. Ry. vs. I. C. C.

The question of law as to whether competition that "*affects rates*" can be considered, has been settled by this Court in T. & P. Ry. Co. vs. I. C. C., known as the Import case, 162 U. S., 233, 234.

LXVII.

Basing Points or Trade Centers.

The Commission in discussing the through rates from Louisville, St. Louis, and Cincinnati, to Troy, says: "The through rates to Troy are *based* on the Montgomery rates, and in making them Montgomery is treated as a *trade center*, or *basing point*, and Troy as a local. . . . The vice in the through rate to Troy, if any, arises from this fact, and from the consequently greater disproportionate charges for the haul from Montgomery to Troy, when compared with that from Louisville and the West to Montgomery."

"The trade center or basing point system has been in many cases pronounced unlawful by this Commission," etc.

See Trans., p. 63, left col.

"The *trade center*, or *basing point* system" of rate-making in the Southern States, which "has been pronounced unlawful" by the Commission, is thus described by Commissioner Walker: "Certain large cities and towns situated on the coast, at interior river points, and at *railroad junctions*, are *called* competitive, and *receive* quite low rates on all interstate traffic; all other stations are called local, and are charged much higher rates. The rates

to local points are made by adding to the competitive rates at the nearest competitive point the local rate from that point.

1 I. C. C. Rep., 244, Harwell vs. C. & W. R. R.

Judge Cooley was quoted in argument as saying that the pre-eminence of such trade centers in the Southern territory "is peculiar, and has probably been increased by the concessions in rates which the railroads have made to them while making less concessions *or none at all* to less important stations." . . .

"The prevalence of such ideas, and the acting upon them in making freight tariffs, gives to railroad managers a power of determinining, within certain limits, what towns shall be trade centers, and what their relative advantages."

1 I. C. C. Rep., 84, in re. L. & N. R. R. Co.

There may be a few mere "railroad junctions" in the South which, owing to the ignorance or corruption of certain railroad officials, have been arbitrarily "called" competitive points, and which "receive" certain arbitrary "concessions" in rates to which they are not justly entitled. There may be also a few strictly local stations in the South, which are not even "railroad junctions" where arbitrary and unfair "concessions" in rates have been made, by certain corrupt railroad officials, to enhance the value of property owned at such stations by said officials, or by their relatives or friends.

All such arbitrarily created so-called "trade centers" or "basing points," are the offspring of ignorance or corruption, and should not be recognized by the courts.

The error of the Commission is in failing to distinguish between those "trade centers," or "basing points" which have been arbitrarily created by certain railroad officials, at certain local stations, or at certain "railroad junctions," and those *natural* "trade centers" or "basing points," situated on the seacoast or on navigable rivers, and which were in existence as such "trade centers" and "basing points" long before railroads were ever dreamed of.

Montgomery is situated on the Alabama River, which is navi-

gable to the Gulf. Columbus and Eufaula are situated on the Chattahoochee River, which is also navigable to the Gulf.

All three of these were "trade centers," and "basing points," long before a mile of railroad existed on the face of the earth.

Before any railroads were built in Alabama, traffic from Cincinnati, Louisville and St. Louis was boated down the Ohio and Mississippi Rivers to New Orleans; thence by the Gulf to Mobile, and thence by the Alabama River to Montgomery; or to Apalachicola, and thence by the Chattahoochee River to Columbus and Eufaula.

They were important "trade centers" in those early days and their prominence over adjacent interior towns, such as Troy, was far greater then than now. Troy was then, as now, a local, non-competitive point.

The rates from Louisville, Cincinnati and St. Louis to Troy, were then, as now, "based" on the through rates from those cities to Montgomery, Columbus, or Eufaula, to which were added wagon rates from Montgomery, Columbus, or Eufaula, to Troy.

We see, therefore, that Montgomery, Columbus, and Eufaula are *natural* "basing points" for making rates to and from Troy; because they were the nearest points to Troy that were situated on navigable water courses.

We see also that Montgomery, Columbus, and Eufaula are *natural* "trade centers," by reason of their being situated on navigable water courses and in the midst of a large and fertile territory, which is necessarily dependent upon them for commercial facilities.

We see also that Montgomery, Columbus, and Eufaula have not been arbitrarily favored with exceptionally low rates by the ignorance or corruption of railroad officials.

We see also that railroad officials, instead of creating the advantages which Montgomery, Columbus, and Eufaula enjoy over Troy, have simply recognized these advantages as they found them in existence when the railroads first reached those points.

Of course there is a discrimination in favor of Montgomery, Columbus, and Eufaula, as compared with Troy, in the matter of rates; but the discrimination has always existed, and in no sense has it been created or increased by the railroads. On the contrary, the railroads have diminished the discrimination to the exact extent of the difference between the wagon rates which formerly prevailed and the rail rates which now prevail to and from Troy.

Such discrimination as now remains is not the fault or contrivance of the railroads, but it is the necessary result of circumstances altogether beyond their control.

See 23 Fed. Rep., 533. *Ex parte Koehler.*

LXVIII.

Basing Points Are Not Confined to the South.

Freight tariffs covering the traffic from the Eastern seaboard territory to Western points are established under the rules and regulations of the associations known as the Trunk Line and Central Traffic Associations. Under agreements of several years standing, it has been the custom of these roads, forming by connections through lines from the seaboard to the West, to determine through rates from New York to Chicago, "and to adopt such rates *as the standard or basis* for the construction of tariffs from other Eastern cities, and points adjacent thereto, which are directly or indirectly in competition for Western business."

"For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates." * * * *

"The agreed rates and distances from New York to Chicago are taken as the standard, or 100 per cent. Through rates to the principal Western cities, towns, and junction points in the territory above described are computed at a percentage of the New York-Chicago rates, based generally on the relative mileage of such points to the Chicago mileage. For example, rates from New

York to Detroit, Mich., are computed at 78 per cent. of the rate from New York to Chicago. In the same manner rates from New York to Indianapolis, Ind., are 93 per cent. of the New York-Chicago rates; Cincinnati, O., 87 per cent.; Erie, Penn., 60 per cent.; Columbus, O., 77 per cent.; Cleveland, O., 71 per cent.; St. Louis, Mo., 116 per cent. Thus the New York-Chicago rates being at all times applied as the basis would, when changed, create relative changes in the rates to other Western points. In a similar manner the relation as to rates is maintained from the other Eastern cities. When the rates from New York to Western points are changed like changes are made from Boston, Philadelpia and Baltimore, and points receiving the same rates, the 'differentials' as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages and Transportation, Senate Rep. No. 1394, 2d Sess. 52d Con., Part I, pp. 429, 430.

And so with reference to through rates from Kansas and Nebraska points to the seaboard. "The through rates to the Eastern seaboard are generally made on the combination of the rates east and west of the Mississippi River."

Wholesale Prices, Wages and Transportation, Senate Rep. No. 1394, 2d Sess. 52d Con., Part I., p. 552.

The rates and distances from New York to Chicago are taken as the base in the territory between those cities, because of the water competition from Chicago to New York via the lakes, the Erie Canal, and the Hudson River; and that line of water transportation is the only water line from the Northeastern seacoast to Mississippi River. But the Southern territory is surrounded on the east and south by the Atlantic Ocean and the Gulf of Mexico, and on the west and north by the Mississippi and Ohio Rivers. It is also penetrated by numerous rivers navigable by steamboats from the ocean for considerable distances into the interior.

It is therefore impossible to adopt in the South any one set of rates or any particular distance as a standard for making rates for that entire territory. To illustrate, if it were attempted to take the distance and the rates from New York to New Orleans as a standard, and to fix the rates from New York to Norfolk, or

New York to Charleston, or New York to Savannah, or New York to Montgomery, or New York to Columbus, or New York to Eufaula, or New York to Mobile as certain per cents of the rates from New York, as governed by mere distance, such rates could not be maintained like similar percentages are obtained between certain cities in the territory between Chicago and New York, because they would be cut in almost every instance, either by the all water lines, or by the rail and water lines.

The only possible way by which the basing system employed in the territory between New York and Chicago could be made applicable in the Southern territory, would be to make all carriers by water subject to the Act to Regulate Commerce, and establish by legislative enactment, or otherwise, certain relative rates to and from all of the principal points in the South, and then reqire all carriers, whether by rail or water, to maintain the rates so fixed.

LXIX.

Combination Rates.

The rate on cotton from Troy to New Orleans is 68 cents per 100 pounds. It is what is known as a combination rate; and is made up of a local rate of 23 cents per 100 pounds, charged either by the Alabama Midland Ry., or by the Georgia Central R. R., from Troy to Montgomery, and a competitive rate of 45 cents, charged either by the Louisville & Nashville R. R., or by some other competitive line, from Montgomery to New Orleans.

Trans. p. 59 right col.

There is no pretence that the local rate of 23 cents per 100 pounds, is unreasonably high on cotton shipped from Troy, destined to stop at Montgomery.

The Commission, itself, has held that where complaint is made of rates, as being unreasonably high, the burden of proof is on the complainant; and, if no proofs are put in by either party, the complaint will be dismissed.

1 I. C. C. Rep., 104, Fulton vs. C., St. P., M. & O. R. R.

There was no proof to show that said rate was unreasonably high; on the contrary, the proof shows that said rate is ap-

proved by the Railroad Commission of Alabama as a just and reasonable rate.

McLendon, Trans., p. 351.

There is no pretence that the rate of 45 cents per 100 pounds is unreasonably high, on cotton originating at Montgomery, destined to New Orleans.

Said rate is necessarily a very low rate; because it is the result of competition between the following lines:

(1) The Louisville & Nashville Railroad from Montgomery to New Orleans.

(2) The Alabama River to Mobile; and thence to New Orleans.

(*a*) Via steam and sailing vessels.
(*b*) Via Louisville & Nashville Railroad.

(3) The Western Railway of Alabama to Selma; thence via the East Tennessee, Virginia and Georgia Railroad to Meridian; thence via the New Orleans and Northeastern Railroad to New Orleans.

(4) The Western Railway of Alabama to Selma; thence via the East Tennessee, Virginia & Georgia Railroad to Meridian; thence via the Queen & Crescent Railway to Jackson, Miss.; thence via the Illinois Central Railroad to New Orleans.

Said lines are illustrated by a Diagram No. 3, referred to in Section XXXIII.

Considering that the rate on cotton from Montgomery to New Orleans has been reduced to 45 cents per 100 pounds by the competition (water as well as rail) above referred to, it is unreasonable to require any further reduction in it.

As the Commission is in the habit of saying that basing points like Montgomery and New Orleans are unduly favored with low competitive rates, while intermediate local stations are charged too much, it is not to be supposed that the Commission, itself, intends to still further favor Montgomery, and New Orleans, by requiring a still further reduction on cotton rates between those points.

But, if the rate of 45 cents per 100 pounds, on cotton from Montgomery to New Orleans, is not to be reduced, it is im-

possible to give Troy a rate of 50 cents per 100 pounds to New Orleans, unless the Alabama Midland Railway is forced to accept 5 cents per 100 pounds for transportation from Troy to Montgomery, when the Railroad Commission of Alabama has approved a rate of 23 cents per 100 pounds as a reasonably low rate for that service.

It has been repeatedly held that there is no law which requires the Alabama Midland Railway and the Louisville & Nashville Railroad to make joint through rates on cotton from Troy to New Orleans.

The Alabama Midland Railway has the right to refuse to carry beyond its own line which terminates at Montgomery.

110 U. S., p. 680, A. T. & S. F. R. R. vs. D. & N. O. R. R.
41 Fed. Rep., 563, L. R. & M. R. Co. vs. St. L. I. M. & S. Ry. Co.
65 Fed. Rep., 41, St. L. Drayage Co. vs. L. & N. R. R. Co.

And the Louisville & Nashville R. R. Co. has the right to refuse to make joint through rates with the Alabama Midland Railway from Troy, a point which is not located on the line of the Louisville & Nashville Railroad.

37 Fed. Rep., 572, K. & I. Bridge Co. vs. L. & N. R. R. Co.
41 Fed. Rep., 563, L. R. & M. R. Co. vs. St. L. I. M. & S. Ry. Co.
51 Fed. Rep., 474, 475, O. S. L. & U. N. Ry. Co. vs. N. P. R. Co.
52 Fed. Rep., 915, C. & N. W. Ry. Co. vs. Osborne.
59 Fed. Rep., 402, 403, L. R. & M. P. Co. vs. St. L. I. M. & S. Ry. Co.
63 Fed. Rep., 778, 779, L. R. & M. R. Co. vs. St. L. & S. W. Ry. Co.
65 Fed. Rep., 41, St. Louis Drayage Co. vs. L. & N. R. R. Co.

If the Alabama Midland Railway and the Louisville & Nashville Railroad see proper to issue through bills of lading and make joint through rates on cotton from Troy to Montgomery, it is a voluntary act upon their part; and it is a convenience and advantage to the shipping public at Troy.

But the mere fact that those two companies have endeavored to accommodate the shipping public at Troy by joining in

through rates and in issuing through bills of lading, which the public had no right to require, furnishes no reason for adjuding their through rate to be unreasonably high, merely because it is made by combining the reasonable rates which those companies would have respectively charged if such through rates had been agreed upon, and such through bills of lading had not been issued. If the rates respectively charged by those roads for transportation over their respective lines were just and reasonable before they were combined into a through rate, the through rate which resulted from such combination must itself be just and reasonable. Any other view of the question would force the railroads of this country to abandon the system of through rates, and through bills of lading, in order to be allowed to charge their own reasonable rate. Such a course would not result in any decrease in the rates between different points; but it would seriously inconvenience the shipping public.

LXX.

The Commission Has no Power to Fix Rates.

One order made by the Commission enjoins the defendants to charge "on shipments of cotton from Troy aforesaid through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cents per 100 lbs."

Trans., p. 69.

In the case of the James & Mayer Buggy Co. vs. The C., N. O. & T. P. Ry. Co. et al., known as the Social Circle case, one of the orders made by the Commission was that the defendants in that case, desist from making any charge for the transportation of *first-class* freight from Cincinnati to Atlanta, in excess of 81 per 100 lbs.

See 4th I. C. C. Rep., p. 757.

It was with reference to the above mentioned order, made by the Commission in the Social Circle case, that this Court said:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

"We do not find any provision of the Act that expressly, or by necessary implication, confers such a power."

See C., N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S., p. 196.

In the case of the I. C. C. vs. L. & N. R. R. Co., the Commission ordered that so long as the rate charged by the Louisville & Nashville R. R. Co. for any kind or class of coal from certain mines to Memphis, shall not exceed the amount of $1.40 per ton, the rate charged by said company for the transportation from said mines to Nashville, of coal classed as "run of mines, nut and slack," shall not at any time exceed the amount of $1 per ton; and the rate charged by said company for the transportation from said mines to Nashville, of coal classed as "screened coal," shall not at any time exceed the amount of $1.15 per ton.

In other words the Commission, in that case, assumed the power to fix certain maxima rates from said mines to Nashville, by requiring them to bear a certain relation to the rates charged from the same mines to Memphis.

Judge Clark, holding the United States Circuit Court for the Middle District of Tennessee, said:

"The Social Circle case denies power in the Commission to fix rates, and puts that question at rest."

See I. C. C. vs. L. & N. R. R. Co., 73 Fed. Rep., 429.

In the case of the I. C. C. vs. The Lehigh Valley R. R. Co., the Commission ordered the defendant to desist from charging any greater compensation for the transportation of divers kinds and sizes of anthracite coal between certain points, than certain rates designated in said order; and among other maxima rates fixed in said order, was a rate of $1.50 per ton for the transportation of lump coal.

Judge Acheson, holding the Circuit Court of the United States for the Eastern District of Pennsylvania, after quoting from the decision of this Court in the Social Circle case, said:

"These views of the Supreme Court decisively show that the Interstate Commerce Commission is not clothed with the power to fix rates which it undertook to exercise in this case."

See I. C. C. vs. L. V. R. R. Co., 74 Fed. Rep., 787, 788.

In the case of the Interstate Commerce Commission vs. The Northeastern R. R. Co. of South Carolina et al., the Commission ordered the defendants to desist from charging any greater compensation for the tranportation of certain vegetables, between certain points, than certain maxima rates specified in said order;

and, among other maxima rates fixed in said order, was a rate of $3.84 per 100 pounds on strawberries.

Judge Simonton, holding the Circuit Court of the United States for the District of South Carolina, after stating the decision of this Court in the Social Circle case, said:

"The case at bar seems to be on all fours with this case. The Interstate Commerce Commission asks this Court to enforce its orders fixing rates for truck between Charleston and New York. The Court can only enforce the lawful orders of the Commission. As has been seen, the Commission is not warranted by the Act of Congress, to fix rates, and to this extent its order is not lawful."

See I. C. C. vs. N. E. R. R. Co. of South Carolina et al., 74 Fed. Rep., Rep., pp. 72, 73.

In the case at bar, the Court of Appeals of the Fifth Circuit followed the Social Circle case, and held that the Commission has no power to fix rates.

See I. C. C. vs. Alabama Midland Ry. Co. et al., 74 Fed. Rep., p. 722.

In the case of the I. C. C. vs. C., N. O. & T. P. Ry. Co. et al., Judge Sage said: "The power of the Commission to fix rates was denied by the Supreme Court in the Cincinnati, New Orleans & Texas Pacific Railway Co. vs. The Interstate Commerce Commission, 162 U. S., 196, known as the Social Circle case."

76 Fed. Rep., 184, I. C. C. vs. C., N. O. & T. P. Ry. Co. et al.

In every case decided at Circuit, or in the Court of Appeals, since the decision in the Social Circle case, it has been held that the Social Circle case determined the question of the power of the Commission to fix rates.

LXXI.

It was argued by counsel for the Commission, in the Circuit Court of Appeals, that this Court, in the Social Circle case, sustained an order of the Commission fixing a maximum rate.

Counsel said:

"In the 'Social Circle' case the order of the Commission prescribed a maximum rate to Social Circle, by directing the defendants to cease and desist from charging or receiving any greater compensation in the aggregate for transportation of buggies, etc., for the shorter distance to Social Circle, than they charge or receive for transportation of such freight for the longer distance over the same line to Augusta."

It is true that this Court sustained *that* order of the Commission upon the facts of that case; but I deny that said order "prescribed a maximum rate," or any other rate, to Social Circle. Said order left the defendants at perfect liberty to charge any rates that were reasonable and just; and the only requirement of said order was that the rates to Social Circle should not exceed the rates to Augusta.

Said order was made in almost the exact language of the long and short haul clause of the fourth section of the Act to Regulate Commerce, which declares it to be unlawful to charge any greater compensation in the aggregate for the transportation of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance. The Commission found as facts in the Social Circle case, that the transportation to Social Circle was done under substantially similar circumstances and conditions as the transportation to Augusta; that the transportation to Social Circle was for a shorter distance than the distance to Augusta; that it was over the same line, in the same direction, and that the shorter was included within the longer distance. The Commission having found those facts, ordered, almost in the language of the fourth section, that the defendants should cease and desist from charging any greater compensation to Social Circle than they charged to Augusta; but it left defendants free to fix their own rates either to Augusta, or to Social Circle, provided such

rates be reasonable and just, and provided the rates to Social Circle do not exceed those to Augusta.

In the case at bar, the Commission has ordered the defendants not to charge more than the maximum rate of 50 cents per 100 lbs. on cotton from Troy, through Montgomery, to New Orleans.

In other words, the only order of the Commission, in the Social Circle case, which this Court approved, was an order which did *not* fix maxima rates, or any other rates; while the order of the Commission in the case at bar, does fix a maximum rate on cotton from Troy to Montgomery.

LXXII.

It was argued by counsel for the Commission in the Circuit Court of Appeals, that "in what this Court says in 'Social Circle' case as to power of Commission to prescribe rates, it had in mind the exercise by the Commission of a power 'to itself fix rates—' that is, 'of its own motion, and without hearing the parties to be affected.'"

In the Social Circle case, the Commission did *not* attempt "to itself fix rates," "*of its own motion, without hearing the parties to be affected.*"

By reference to the report of the case of the James & Mayer Buggy Co. vs. C., N. O. & T. P. Ry. Co. et al., known as the Social Circle case, 4 I. C. C. Rep., p. 745, it will be seen that the James & Mayer Buggy Co. filed a written complaint before the Commission, in which it insisted that said company ought not to be compelled to pay the same freight charge to Atlanta as to Augusta, 171 miles the greater distance. It will be seen that said complaint was answered by the defendants thereto. pp. 745, 747. It will be seen that the defendants in their answers insisted "that the rate to Atlanta is no more than reasonable for the service rendered." pp. 746, 750. It will be seen that testimony was heard by the Commission as to the reasonableness of the rate to Atlanta; and that upon the pleadings and testimony, the Commission said:

"We do not feel justified in determining upon a more moderate rate than $1 per 100 pounds of first-class freight, in less than car loads." p. 751.

This Court, in its decision in the Social Circle case, refers to the fact that the James & Mayer Buggy Co. filed a complaint before the Commission, insisting that the rate charged to Atlanta was excessive; that the defendants in that case claimed that the rate to Atlanta was reasonable; that testimony was offered and heard before the Commission; and that the order of the Commission was based upon the pleadings and proof in that case.

See C., N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S., pp. 185, 186, 194, 195.

It is impossible, therefore, to suppose that in what this Court said in the Social Circle case, as to the power of the Commission to prescribe rates, it had in mind the exercise by the Commission of a power "to itself fix rates," i. e., to fix rates "*of its own motion and without hearing the parties to be affected;*" because the rate which the Commission fixed in that case to Atlanta was *not* fixed "*of its own motion,*" but was fixed *upon a full hearing of* "*the parties to be affected;*" which hearing was had as well, upon pleadings, as upon proof.

LXXIII.

It was argued by counsel for the Commission in the Circuit Court of Appeals, that when this Court said in the Social Circle case that the Commission had no power "to *itself* fix rates," it had "reference to the action of the Commission in prescribing a rate to Atlanta on evidence which it is intimated, was not sufficient, and in the absence of proof of material facts."

This Court, in discussing "the action of the Interstate Commerce Commission, in fixing a maximum rate of charges for the transportation of freight of the first-class in less than carloads from Cincinnati to Atlanta," said:

"This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the Commission, namely: Did the Court err in not holding that, in point of law, the Interstate Commerce Commission had power to fix a maximum rate, and, if such power existed, did the Court err in not holding that the evidence justified the rate fixed by the Commission and not decreeing accordingly?"

C., N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S., p. 194.

This Court disposed of the last question first; and said that as both the Circuit Court, and the Court of Appeals found, as a fact, that the rate to Atlanta was reasonable, this Court did not feel disposed "to review their finding on that matter of fact."

This Court having disposed of the question of fact as to whether "the evidence justified the rate fixed by the Commission," took up the question of law as to "whether Congress intended to confer upon the Interstate Commerce Commission the power to itself to fix rates;" and it was with reference to that question of law, that the Court said: "We do not find any provision of the Act that expressly, or by necessary implication, confers such a power."

C., N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S., p. 196.

It is impossible, therefore, to suppose that this Court, in using the language just quoted, had reference to the action of the Commission in prescribing a rate "on evidence which was not sufficient," or, "in the absence of proof of material facts;" because the Court had disposed of the question of "evidence," or "fact," before it entered upon the question of law as to the power of the Commission to fix rates; and it was with reference to that question of law, and not with reference to the question of fact, that the Court said: "We do not find any provisions of the Act that expressly, or by necessary implication, confers such a power."

LXXIV.

Counsel for the Commission, in the Circuit Court of Appeals, argued that this Court, in the Social Circle Case, had in mind a certain general order issued by the Commission on March 23, 1889, in the "Import case;" which order *was* made by the Commission, "of its own motion, and without a hearing of the parties to be affected."

I submit that it is not treating this Court with due respect, to assume that it decided a principle in one case, which it really intended for a different case.

But counsel are mistaken in supposing that the bill which was filed by the Commission in the "Import case" was filed to enforce said general order of March 23, 1889. Said bill was filed to enforce an order which was made by the Commission *on*

January 29, 1891. The last mentioned order was made by the Commission upon a written complaint filed by the New York Board of Trade and Transportation against certain railroad companies. Said companies answered the complaint; testimony was taken before the Commission upon the issues joined; and a full hearing was had upon pleadings and proof, which resulted in said order *of January* 29, 1891, to enforce which the bill in the "Import case" was filed by the Commission.

T. & P. Ry. Co. vs. I. C. C., 162 U. S., pp. 199, 200, 201.

The main question in the "Import case," as stated by this Court, itself, was, "whether the Commission erred, when making the order *of January* 29, 1891, in not taking into consideration ocean competition," etc.

See 162 U. S., p. 205.

In the "Import case," the power of the Commission to fix rates was not discussed, either by Court or counsel, and as the validity of the general order of March 23, 1889, made by the Commission "of its own motion and without a hearing of the parties to be affected," was not involved in that case, it is impossible to suppose that this Court could have had in mind the "Import case," when deciding, in the Social Circle case, that the Commission has no power to make or fix rates.

LXXV.

Counsel for the Commission, in the Circuit Court of Appeals, referred to the language of this Court in the Social Circle case, where it was said that "if the Commision, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is *prejudged* by the Commission to be reasonable." Counsel contended that the language just quoted must necessarily refer to some such general order as was made by the Commission on March 23, 1889, in the "Import case," where the Commission acted "of its own motion, and without a hearing of the parties to be affected."

I have shown, in Section LXXIII, that the order of the Commission in the Social Circle case, which this Court was reviewing when it used the word "prejudged," was not made by the Commission "of its own motion," but was made upon a full hearing of "the parties to be affected."

But, whether an order is made by the Commission "of its own motion," or is made upon a full "hearing of the parties to be affected," it is equally illegal, if it attempts to fix maximum rates to be charged *in the future*. In either case, the Commission *prejudges* the reasonableness of the rate so fixed by itself, and precludes the carrier from showing that the rate so fixed, in advance, by the Commission, is unreasonably low.

To illustrate: Although the order in the Social Circle case, and the order in the case at bar, were both made by the Commission upon a full "hearing of the parties to be affected," they both "prejudge" the question as to what is a reasonable rate to be charged *in the future*. In the Social Circle case, the Commission "prejudged" that $1 per hundred pounds is a reasonable rate on first-class freight from Cincinnati to Atlanta; and in the case at bar, it "prejudged" that 50 cents per hundred pounds is a reasonable rate on cotton from Troy to New Orleans. The rate which the Appellees charge is 68 cents per hundred pounds. The Commission was fully authorized to find and report whether said rate of 68 cents per hundred pounds is reasonable or not; but it has no authority to *prejudge*, as it did, that the rate, *in the future*, shall not exceed 50 cents per hundred pounds.

In the case of Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362, the Railroad Commission of Texas had undertaken to fix certain rates, which were declared by the Court to be unreasonably low; the Court, however, did not undertake to "prejudge" what rates would be reasonably high, to be charged *in the future*. On the contrary, the Court held that though it is within the power of a Court of Equity in such case to decree that the rates so established by the Commission are unreasonable and unjust, and to restrain their enforcement; it is not within its power to establish rates itself, or to restrain the Commission from again establishing rates.

See 154 U. S., 362, Reagan vs. Farmers Loan & Trust Co.
See 156 U. S., 663, St. L. & S. F. Ry. vs. Gill.

And so under the Act to Regulate Commerce, while it is within the power of the Interstate Commerce Commission to find and report that the rates established by a railroad company are unreasonable and unjust, it is not within its power to establish rates itself, or to restrain the company from again estalishing rates.

Except in those states whose railroad rates are fixed by statute, or by a Commission expressly authorized to fix them, the rates which a railroad may reasonably charge necessarily vary, from time to time, with the circumstances and conditions under which they are made.

To illustrate: It was found in the Social Circle case, that prior to the construction of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham, the rate on first-class freight from Cincinnati to Birmingham had been $1.08 per hundred pounds; and it was not shown that it had ever been complained of as unreasonably high. But upon the completion of that road, the rate from Memphis to Birmingham was reduced. And, in order to preserve the relative adjustment of rates to Birmingham as between Memphis and Cincinnati, the rate had to be reduced from Cincinnati to Birmingham from $1.08 to 89 cents per hundred pounds. And yet the service performed by the railroads between Cincinnati and Memphis was the same after the completion of said road, as before.

This is one out of hundreds of instances that might be cited to show that reasonable rail rates necessarily vary, from time to time, with the circumstances and conditions under which they are made; and that it is impossible for any judicial, or *quasi* judicial tribunal to decide what rates will be reasonably high to be charged *in the future* without "prejudging" the question; and "prejudging" it before the facts and circumstances arise which are necessary for its determination.

Of course, where rates are fixed by statute, or by a Commission expressly authorized to fix them, the Courts are precluded from examining into the circumstances and conditions affecting the reasonableness of such rates; and they are limited in their inquiry to determining whether the rates are so low as to practically amount to taking property without compensation.

LXXVI.

Counsel for the Commission, in the Circuit Court of Appeals, contended that the "Import case" expressly recognizes the authority of the Commission to prescribe a rate in a given case, after due consideration of material facts and circumstances.

I have shown in Section LXXIV., tha tthe power of the Commission to fix rates was not discussed in the "Import case."

Counsel referred to the following language used by this Court in the "Import case:"

"We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the Commission, or by the Courts below, in respect to what were proper rates to be charged by the Texas & Pacfic Railway Company. That was a question of fact, and if the inquiry had been conducted on a proper basis, we should not have felt inclined to review conclusions so reached. But we mention them to show that there manifestly was error in excluding facts and circumstances that ought to have been considered, and that this error arose out of a misconception of the purpose and meaning of the Act."

T. & P. Ry. Co. vs. I. C. C., 162 U. S., p. 235.

The "facts and circumstances" which this Court held ought to have been considered by the Commission, and by the Courts below, were those attending the ocean competition from Liverpool to San Francisco; and what this Court meant, by the language just quoted, was that if the Commission, and the Courts below, had taken those competitive facts and circumstances into consideration, and had then been of opinion, after giving them due weight, that the rates charged by the Texas & Pacific Railway Company from New Orleans to San Francisco were unreasonable, or improper, this Court would not have felt inclined to review the conclusions of fact so reached.

I have never contended that the Commission is not authorized, after giving due consideration to all such facts and circumstances as ought to be considered, to find and report whether the rates now charged by the defendants from Troy to New Orleans on

cotton, are just and reasonable, or not. On the contrary, I have always conceded that the Act does confer upon the Commission power to find and report upon that question, and to declare, if it so thinks, that said rates are unjust and unreasonable. But my contention is that when the Commission shall have found and reported that the rates now charged by the defendants are improper or unreasonable, its functions, like those of a Court of Equity, are at an end; and that the Commission has no more power than a Court of Equity to "prejudge" what rates will be just and reasonable for the defendant to charge *in the future.*

LXXVII.

Counsel for the Commission, in the Circuit Court of Appeals, contended that the power of the Commission to prescribe a rate is necessarily implied from the provisions of the statute.

Counsel admits that the power is not expressly given by the Act; his only contention is that such power is necessarily implied.

This contention of counsel was answered by this Court in the Social Circle case in the following language: "We do not find any provision of the Act that expressly, or by necessary implication, confers such a power."

C., N. O. & T. P. Ry. Co. vs. I. C. C., 162 U. S., p. 196.

In the Social Circle case, on the cross appeal, which the Commission prayed from the decree of the Circuit Court of Appeals, *and which cross appeal was prayed for the express purpose of getting the opinion of this Court upon the question as to whether the Commission has power to fix rates*, the first assignment of error, made by the Commission, was in the following language: "That said Circuit Court of Appeals erred in not holding that, in point of law, the said Interstate Commerce Commission had power to fix the maximum rate which it did fix as shown by the record."

There cannot, therefore, be the slightest doubt but that the exact question was raised in that case, which has been argued in this case; and the argument of counsel for the commission in that case was substantially the same as in this case.

Counsel contended in that case, as in the case at bar, that the power of the Commission to fix rates, though not expressly given, is necessarily implied.

I make the following quotations from "Points Submitted by Mr. Edmunds and Mr. Hammond, of counsel for the Interstate Commerce Commission," in this Court, at the October Term, 1894, pp. 10-12.

"II. The Commission had the power to establish a maximum rate on a definite class of goods between defined places in different States *in a case in which the subject was properly before them, as it was in this case.* The charge from Cincinnati to Atlanta was a necessary element in the disposition of the charge to be made from Cincinnati to Social Circle and Augusta, for if the Commission had stopped at the requirements of a given rate from Cincinnati to Social Circle as not exceeding that to Augusta, the roads from Cincinnati to Chattanooga and so to Atlanta might have so changed their charges as to have made a through rate unjust to the road from Atlanta to Social Circle and Augusta. Thus it was essential to complete and permanent justice and relief that both points should be covered by the decision of the Commission."

"The 12th section of the Interstate Commerce Act, as amended, requires the Commission "to execute and enforce the provisions of this Act." The 13th section of the act authorizes the Commission to investigate any complaints that may be made concerning interstate transportation and to "institute any inquiry on its own motion" in respect of interstate transportation. The 14th section provides "that whenever any investigation shall be made by said Commission, it shall be its duty to make its report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation," etc., and the Act makes all such proceedings a matter of record. The 15th section provides that when the Commission shall have found that any wrong is being done by any carrier and shall have come to its conclusion sion thereon in the manner before stated, it shall forward a copy of its report to the carrier, "together with a notice to said common carrier to cease and desist from such violation," etc. Thus it was

distinctly within the substantial and remedial language of the act that the Commission should have power, on a complaint that transportation charges were too high, to require that they should not exceed a certain sum named in the order of the Commission. Again, it is obvious that a mere order of the Commission in the case in hand, or in any other similar case, that a particular rate complained of was excessive and should not be demanded, and, stopping there, would be absolutely futile, not to say ridiculous, for, if the excessive rate were found to be one dollar and the true and just rate fifty cents in a given case, if the Commission were to direct that one dollar should not be charged, the carrier could obey that order by charging ninety-nine cents and then, after a new complaint should have been instituted and heard and ninety-nine cents found to be excessive, that order could be obeyed by reducing the charge to ninety-eight cents, and so on, step by step, on a fresh suit for each case, at last reach the just rate of fifty cents. It is worse than absurd, we submit, to put any such construction as this upon the Act of Congress."

I make the following quotations from "Points and Suggestions Supplemental to Briefs filed on Behalf of the Interstate Commerce Commission at the October Term, 1894," of this Court in the Social Circle case; which supplemental points and suggestions were filed at the October Term, 1895, of this Court.

See pp. 8 to 10.

"It is obvious that the largest part of the duties of the Commission were made to relate to the investigation and decision upon the conduct of the carriers. If this be so, it would necessarily follow that the Commission must have the power, under this general authority given to it, to determine not only whether a particular charge was reasonable, but what the carrier ought to do in respect of a reduction of such charges. This is precisely what the Commission did in this case. It found (and the whole evidence fully sustains its finding) that the price charged for the carriage from Cincinnati to Atlanta was excessive, and that it ought not to be above the one dollar per hundred pounds, which the Commission fixed as a reasonable rate. To hold that the Commission had the authority only to decide that the rate of $1.01 per hundred pounds, or $1.07 per hundred pounds, from Cincinnati to Atlanta, was unreasonable, and stop there, would,

it is submitted, be absurd. A necessary and inseperable part of such a decision must be a determination of what, in the opinion of the Commission, a reasonable and proper rate would be."

"As has been stated in the briefs at the last term, the result of holding that the Commission only had the power to say that the particular rate was unreasonable, would be that the carrier might reduce his rate one cent per hundred pounds, and thereby technically save himself from any condemnation under the finding of the Commission, and so that the complaint would have been completely answered, and the finding of the Commission would have been completely conformed to. Then, on another complaint and a similar finding, another cent per hundred pounds reduction could be made by the carrier, and that decision would have been completely conformed to; and so on *ad infinitum*. The absurdity of such a proposition is too apparent to need any discussion unless it might be supposed to have been the policy of Congress to so frame them as to render these remedial Acts absolutely nugatory."

"We submit, therefore, that the rate from Cincinnati to Atlanta of one dollar per hundred pounds, was reasonable and proper, and that the Commission had authority to fix that maximum."

"It has been suggested that these questions were not properly before the Commission; to which it is answered that the Commission, by the statute had the right on its own motion to investigate and decide upon everything embraced in the Act; and, secondly, that the petition of the particular complainant distinctly raised the question of reasonable rates from Cincinnati to Atlanta. The sixth clause of the complaint distinctly states that the complainant ought not to be compelled to pay the same rate on shipping vehicles to Atlanta as to Augusta. (R., p. 6, cl. 6)."

It seems to me to be useless to consume the time of this Court in replying to arguments which have already been considered by this Court; but as they were urged in the Circuit Court of Appeals, I assume that they will be again presented to this Court.

After the decision of this Court, in the Social Circle case, the

same arguments were submitted to the Circuit Court of Appeals, in the case at bar, 74 Fed. Rep., 715, and to the Circuit Court in the case of I. C. C. vs. C., N. O. & T. P. Ry. Co. et als., 76 Fed. Rep., 183, and in both cases the Court declined to follow them.

LXXVIII.

In Alabama, a "Board of three railroad Commissioners are empowered *to revise tariffs* from time to time, and if too high, or unjustly discriminative, to notify companies of changes required, to approve tariffs when satisfactory, and *to increase or reduce rates* as experience may show to be just."

See 4 An. Rep. I. C. C. (1890), p. 243.

In Arkansas, "the Governor, Secretary of State and Auditor of Public Accounts constitute the Board of Railroad Commissioners, and may *reduce rates* when profits exceed a prescribed limit."

4th An. Rep. I. C. C. (1890), p. 244.

In California, a "Commission of three members is empowered *to establish, alter and publish transportation charges*, and to hear and determine complaints."

See 4th An. Rep. I. C. C. (1890), p. 244.

In Florida, a "Board of three Commissioners is empowered *to make, revise and alter tariffs of railway charges*," etc.

See 4th An. Rep. I. C. C. (1890), p. 246.

In Georgia, a "Board of three Commissioners is empowered *to make, revise and alter tariffs of railway charges.*"

4th An. Rep. I. C. C. (1890), p. 246.

In Iowa, a "Board of Raiload Commissioners is authorized to hear and decide complaints subject to revision of regular courts, and *to make, revise and alter schedules of maximum charges.*"

4th An. Rep. I. C. C. (1890), p. 247.

In Illinois, a "Board of three Commissioners is empowered *to make, revise and alter transportation charges*," etc.

4th An. Rep. I. C. C. (1890), p. 249.

In Kansas, a "Board of three Commissioners is authorized to

investigate complaints *and the rates fixed by the Board shall be accepted by the companies*," etc.

4th An. Rep. I. C. C. (1890), p. 250.

In Maine, a "Board of three Commissioners may, on complaint, and after notice, *revise and alter tariffs of charges* for one year."

4th An. Rep. I. C. C. (1890), p. 252.

In Minnesota, a "Board of three Railroad Commissioners is empowered to require companies *to make changes in tariffs*, and if they refuse, *to make tariffs for them*," etc.

4th An. Rep. I. C. C. (1890), p. 253.

In Mississippi, a "Board of three Commissioners is empowered *to revise, alter and approve the tariffs* of railroad companies, to supervise the same, and *increase or reduce charges* from time to time, as experience may show to be just."

4th An. Rep. I. C. C. (1890), p. 254.

In North Dakota, a "Board of three Railroad Commissioners is empowered *to alter tariffs*," etc.

4th An. Rep. I. C. C. (1890), p. 258.

In South Carolina, a "Board of three Railroad Commissioners is authorized *to make and alter tariffs of freight charges*, etc.

4th An. Rep. I. C. C. (1890), p. 262.

It will be noticed that the Act to Regulate Commerce does not confer upon the Interstate Commerce Commission the power "to revise tariffs;" nor "to fix rates;" nor "to increase or reduce rates;" nor "to establish or alter transportation charges:" nor "to make, revise or alter tariffs of railway charges;" nor "to make, revise or alter schedules of maximum charges;" nor "to correct charges; nor "to make changes in tariffs;" nor "to revise, alter or approve tariffs;" nor "to increase or reduce charges;" nor "to make or alter tariffs of freight charges."

If Congress had intended to confer upon the Interstate Commerce Commission the power to make rates, the statutes of the states above referred to would have furnished precedents, and some such provisions as are quoted above would have been found in the Act to Regulate Commerce.

In Massachusetts, a "Board of three Commissioners is authorized to supervise railroads and see that they conform to the law, to investigate complaints, and make reports and recommendations thereon."

4th An. Rep. I. C. C. (1890), p. 251.

In Kentucky, a "Board of three Railroad Commissioners is authorized to supervise the companies in matters pertaining to their duties to the public, and to hear and determine complaints subject to the revision of the regular Court."

4th An. Rep. I. C. C. (1890), p. 251.

In Missouri, a "Board of Railroad Commissioners is authorized to see that schedules of rates are fair and just, to hear and determine complaints, subject to revision by the Court, and to see that the provisions of the Act are enforced."

4th An. Rep. I. C. C. (1890), p. 254.

In Nebraska, a "Board composed of high State officials and secretaries is empowered to supervise the business of the companies, and to hear and decide complaints subject to revision by the regular Court."

4th An. Rep. I. C. C. (1890), p. 255.

In New Hampshire, a "Board of three Commissioners is charged with supervision of railroads, seeing that they comply with the law, making investigations, and reporting thereon."

4th An. Rep. I. C. C. (1890), p. 256.

In New York, a "Board of three Commissioners has general supervision of railroads and their operation with reference to public safety and conveniences, and it is empowered to investigate and report on violations of law."

4th An. Rep. I. C. C. (1890), p. 257.

In Oregon, a "Board of three Commissioners has power to supervise the business of the railroads as the same affects the public convenience and safety, and to hear and decide complaints, subject to the revision of the Court."

4th An. Rep. I. C. C. (1890), p. 260.

In South Dakota, a "Board of three Commissioners is em-

powered to see that the law is complied with and to prosecute companies for violation thereof, either *suo motu* or on complaint."

4th An. Rep. I. C. C. (1890), p. 262.

In Virginia, "there is one Railroad Commissioner who is required to see that the companies comply with the law, to notify them of violations of law, and, if same are continued, to report to Board of Public Works, who may direct the Commissioner to apply for an injunction to restrain such violations."

4th An. Rep. I. C. C. (1890), p. 264.

In Vermont, a "Board of three Commissioners is to have general supervision of the railroads and to report violations of law to the Legislature, to investigate failure to make connections or furnish accommodations, and to make public their conclusions, and make recommendations in respect thereto, which may be enforced by the Court."

4th. An. Rep. I. C. C. (1890), p. 265.

In Wisconsin, "one Railroad Commissioner is to have supervision of railroads, and to hear and decide complaints, subject to revision by the Courts."

4th. An. Rep. I. C. C. (1890), p. 266.

Congress, instead of giving the Interstate Commerce Commission power to *make rates*, as was done in Alabama, Arkansas, California, Florida, Georgia, Iowa, Illinois, Kansas, Maine, Minnesota, Mississippi, North Dakota, and South Carolina, conferred upon the Interstate Commerce Commission only the power to supervise the railroads, to see that they conform to the law, to investigate complaints, and make reports and recommendations thereon, subject to the revision of the Courts; thus following the precedents furnished by the statutes of Massachusetts, Kentucky, Missouri, Nebraska, New Hampshire, New York, Oregon, South Dakota, Virginia, Vermont, and Wisconsin.

In the Social Circle case, this Court, after holding that the Interstate Commerce Commission has no power to fix rates, said that "subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disad-

vantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free" . . . "*to adjust and apportion their rates* so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

162 U. S., p. 197, C., N. O. & T. P. Ry. vs. I. C. C.

43 Fed. Rep., p. 53, I. C. C. vs. B. & O. R. R.

73 Fed. Rep., p. 426, I. C. C. vs. L. & N. R. R. Co.

74 Fed. Rep., p. 787–788, I. C. C. vs. Lehigh Valley R. R. Co.

74 Fed. Rep., p. 722, I. C. C. vs. Alabama Midland Ry. Co. et al.

Law Rep., 1 Q. B., (1896), pp. 264, 265, Rickett, Smith Co. vs. Midland Ry. Co.

In the case of the K. & I. Bridge Co. vs. L. & N. R. R. Co., Judge Jackson said that the Act "does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just."

37 Fed. Rep., 634, K. & I. Bridge Co. vs. L. & N. R. R. Co.

LXXIX.

The following cases have been cited at Circuit as showing that the English Railroad Commissioners "exercised a very analogous power in fixing through rates:"

The Midland Ry. Co. vs. The Great Western Ry. Co., 2 Nev. & Mac., Ry. and Canal Cases, 88, 95, 96, 97, 98.

The Caledonian Ry. Co. vs. The North Brit. Ry. Co., 3 *Ib.*, 56, 62.

Great North. Ry. Co. of Ireland vs. The Belfast Ry. Co., 3 *Ib.*, 411, 418.

Same vs. Same, 4 Brown & Mac., Ry. and Canal Cases, 159.

By referring to those cases, it will be seen that the English Railway Commissioners were not attempting to fix rates as between the companies and the public. In the first two cases, the Commissioners were virtually acting as arbitrators under a statute which provides that where any difference between railway companies was, under the provision of any general or special Act

required or authorized to be referred to arbitration. Such difference should, at the instance of any company party thereto, be referred to the Commissioners for their decision, in lieu of being referred to arbitration.

See 2 Nev. & Mac., p. 88; 1 Nev. & Mac., p. 6; 3 Nev. & Mac., p. 56.

In the second and third cases cited, the English Commissioners were acting under section 11 of the Act of 1873, which expressly provides that where two companies cannot agree upon a through route or rate, the matter shall be referred to the Commissioners for their decision.

1 Nev. & Mac., p. 8; 4 Brown & Mac., pp. 159, 169.

There are no such provisions in our Act to Regulate Commerce.

LXXX.

In one of the earliest cases decided by the Commission, in answer to an application to compel a certain reduction in rates, it was said by Judge Schoonmaker: "It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, *which it has not*. Its power in respect to rates is to determine *whether those which the road impose are for any reason in conflict with the statute*."

1 I. C. C. Rep., pp. 155, 156, Thacher vs. D. & H. C. Co. et al.

The power of the Commission, even as stated by Judge Shoonmaker, is greater than the Act really confers upon the Commission.

The Commission "is neither a Federal Court under the Constitution, nor does it exercise judicial power, nor do its conclusions possess the efficacy of judicial proceedings." . . . "The functions of the Commission are those of Referees or Special Commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to Interstate Commerce matters covered by the law, the Commission may be regarded as the general Referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the Act."

37 Fed. Rep., p. 613, K. & I. Bridge Co. vs. L. & N. R. R. Co.

"The findings of *fact*," as made by the Commission in reference to the reasonableness of a rate, are made *prima facie* evidence by the Act; but the opinions of the Commission upon the questions of *law*, relating to the reasonableness of a rate, are not given any potency whatever by the Act. Upon the trial of the question, in the Circuit Court, as to the reasonableness of a rate, the case is heard "*de novo*, upon pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters of controversy." The "judgment," or "determination," as to whether a particular rate is reasonable, is to be rendered, not by the Commission, but by the Court.

37 Fed. Rep., 614, K. & I. Bridge Co. vs. L. & N. R. R. Co.
43 Fed. Rep., 43, I. C. C. vs. B. & O. R. R. Co.
49 Fed. Rep., 177, I. C. C. vs. L. V. R. R. Co.
50 Fed. Rep., 295, I. C. C. vs. A., T. & S. F. R. R. Co.
56 Fed. Rep., 926, I. C. C. vs. C., N. O. & T. P. R. R. Co.

I submit, therefore, that Judge Schoonmaker stated the power of the Commission too broadly when he said that the Commission has the right "to *determine*" whether a particular rate is reasonable or not; but I think he stated the power of the Commission correctly when he restricted it to rates "*which the roads impose*."

In this case, certain rates on cotton from Troy to New Orleans were complained of; and the Commission had the power to ascertain all the facts relating to the question as to whether they are reasonable or not; and the facts thus found by the Commission would be *prima facie* evidence when the question came before the Court for *its* "judgment," or "determination." The Commission might with propriety add to its findings of fact, an expression of its opinion as to whether, upon those facts, said rates are, in law, reasonable or not. As, however, such an opinion would necessarily involve matter of law, it would not be entitled, like the findings of fact, to *prima facie* weight in Court. The Commission was not content in this case, with expressing the opinion that said rates are unreasonable; but it went further, and expressed the opinion that any rates higher than 50 cents per 100 lbs. are also unreasonable. In fact, it went still further, and *enjoined* the railroad companies from making any charge higher than 50 cents per 100 lbs.

If a contract for the loan of money be made in a State where 6 per cent. is the legal rate of interest, and the contract stipulates for 10 per cent. interest, a *Court* would declare the contract void, or voidable, for usury, either as to the excess over legal interest, or as to the whole amount of the contract, dependent upon the law of the particular State.

The Court would, however, restrict its judgment to the case before it, and would adjudicate no more than that the contract which stipulated for ten per cent. interest was illegal. The Court might express the opinion that any contract stipulating for interest in excess of six per cent. would also be illegal; but the Court would not assume to enjoin the parties from entering into any future contract stipulating for interest in excess of six per cent. It would leave the parties at liberty to make such contracts as they saw proper; they taking the risk of having such contracts declared illegal, if they should stipulate for interest in excess of six per cent.

The line of reasoning under which the Commission has convinced itself that is is the repository of authority to name future railroad rates, is thus stated by Commissioner Morrison in the case of Coxe Bros. & Co. vs. L. V. R. R. Co. (4 I. C. C. Rep., pp. 577, 578), a case in which it curiously appears that the petitioners did not desire the naming of any maximum rate, while counsel for the defendant took the opposite ground. The Commission uses the following language: "If, impressed with the belief that the existing rates were not exorbitant, a carrier should attempt compliance with the Commissioners' conclusion that they were excessive, by making the least possible reductions, repeated and continual applications would be necessary to correct a single abuse. Certainly Congress intended no such absurdity as this, but, as insisted upon by counsel for the road, when we have been convinced that rates are unjust, it will be our duty to say what they ought to be, or at least to determine upon some rate, any charge in excess of which would be unreasonable. If the duty of the Commission respect to unjust and unlawful rates ends when it has been convinced that rates are unreasonable, and so decides them to be, and for any reason the Commission may not determine what are, as well as what are not reasonable, the regulation provided by the statute begins with complaint and ends in confusion."

It will be seen that the foregoing is simply an argument *ab inconvenienti*. It concedes that the desired power has not been expressly conferred; but since it is thought that the powers claimed to have been granted cannot be usefully exercised, without the further authority to prescribe future rates, this power also must be assumed to have been intented.

Such a claim, in respect to a statute which creates a new administrative jurisdiction, contains its own answer. If the power be not directly granted, it cannot be inferred. If it be essential to the useful operation of the statute, an amendment or addition to the law is the only way in which it can be obtained.

ED. BAXTER,

Of Counsel for Appellees as of Record.

No. 563. 203.

Brief of Wiley for Appellees.

Filed Mar. 8, 1897.

563

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, *Appellant.*

versus

THE ALABAMA MIDLAND RAILWAY COMPANY, *et al.*

Appeal From The United States Circuit Court of Appeals, For The Fifth Circuit.

BRIEF OF

A. A. WILEY,

Attorney for Appellees,

The Alabama Midland Railway Company and The Savannah, Florida and Western Railway Company.

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STATEMENT OF FACTS.

The appeal in this case is taken from a judgment rendered by the United States Circuit Court of Appeals for the Fifth Judicial Circuit, affirming a decree theretofore rendered by the Circuit Court of the United States for the Middle District of Alabama, in Equity, dismissing a bill filed in that court by the Interstate Commerce Commission to enforce obedience to certain orders made by the Commission; and involves the question as to whether or not said orders are lawful, and should be regarded.

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission, at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there is a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint is, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony relates, are:

1. That the Alabama Midland Railway and the defendant roads forming lines with it from Baltimore, New York and the East to Troy and Montgomery charge and collect a higher rate of shipments of class goods from those cities to Troy than on such shipments *through Troy* to Montgomery; the latter being the longer distance point by 52 miles.

2. That the Alabama Midland Railway and Georgia Central Railroad and their connections unjustly discriminate against Troy and in favor of Montgomery, in charging and collecting $3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields, and only $3.00 per ton on such shipments to Montgomery, the longer distant point by

both of said roads; and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is 47 cents, and that from Montgomery, the longer distance point, is only 40 cents; and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

4. That on shipments for export from Montgomery and other points, within the so-called "jurisdiction" of the Southern Railway and Steamship Association, to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower rate is charged than the regular published tariff rate to such seaports, and that Montgomery and such other points are allowed by the rules of said Association to ship through to Liverpool *via* any of these seaports at the lowest through rates on the day of shipment, which may be less than the sum of the regular published rail rate and the ocean rate *via* the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; that this privilege being denied to Troy is an unjust discrimination against that town in favor of Montgomery and such other favored cities, and that it is also a discrimination against shipments which terminate at such seaports in favor of shipments for export.

5. That Troy is unjustly discriminated against in being charged on shipments of cotton *via* Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and Georgia Central.

6. That the rates on "class" goods from Western and Northwestern points, established by the defendants forming lines from those points to Troy, are relatively unjust and discriminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus.

The Commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified as follows, to-wit:

1. On class goods shipped from Louisville, Ky., St. Louis, Mo., or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Ga., and Eufaula, Alabama.

2. On shipments of cotton from Troy aforesaid through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to-wit: Brunswick, Savannah, Charleston, West Point or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah, or Charleston, no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore, or other Northeastern points to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

And the defendants having failed to heed these orders, the Commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in Equity, to compel obedience to the same. On the hearing in said Court the bill of complaint was dismissed, and complainant, the Interstate Commerce Commission, appealed the cause to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, at New Orleans, La. And, thereupon, in said last named Court, on the 2nd day of June, 1896, the decree of the said Circuit Court of the United States for the Middle District of Alabama was in all things duly affirmed; and from this judgment and decree the appellant has appealed to this Honorable Court.

THE ARGUMENT.

We will first consider what is

The Proper Construction of the Act to Regulate Commerce.

In Shaw vs. R. R. Co. (101 U. S. 565) the Supreme Court of the United States held that no statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.

The rule for the construction of the Act under consideration is clearly laid down by the Court of Appeals in the case of C. and W. R'y. Co. vs. Osborne, 10 U. S. Apps., 434–35, in which this language is employed:

"While it is the duty of the Court to see that the provisions established by Congress are not frittered away on technical or trifling grounds, yet is also equally their duty to see that such legislation is not carried beyond its clear scope, and that the owners of private capital invested in the business of transportation be not deprived of their liberty of contract and right of control any farther than the law-making power has intended that they should be."

The Burden of Proving Excessive Rates is Upon Complainant.

The proof shows that the rates complained of are approved by the Railroad Commissions of Alabama and Georgia. There is no evidence showing, or tending to show, that said rates are unreasonably high. Where complaint is made of rates as excessive, the burden is upon complainant to make proof of the fact

alleged; and in the absence of such proof by either party, the complaint will be dismissed. This was so held by the Commission itself in a case where the rates on a railroad were much higher than they had previously been on the same line.

Fulton vs. The Chicago, St. Paul, Minneapolis & Omaha R. R. Co., 1 Vol. I. C. C. Reports, page 104.

AS TO THE FIRST ORDER OF THE COMMISSION.

The distance from Louisville to Montgomery by the L. & N. road is 490 miles; from Cincinnati to Montgomery is 600 miles, and from St. Louis to Montgomery is 624 miles. The distance by the Alabama Midland from Montgomery to Troy is 52 miles, and by the Georgia Central is 71 miles.

Goods are sometimes sent through in the original cars, and at other times transferred *en route* on through shipments from Louisville, Cincinnati and St. Louis *via* Montgomery to Troy. Where cars are sent through Montgomery to their destination at Troy the expense of shipping them between the L. & N. depot and Midland or Central roads is incurred. These are known as switching charges; and in cases where the freight is transferred by hand from car to car that cost is incurred in addition to the expense of switching. These are called terminal charges. Through freight shipments from western points, like Louisville, Cincinnati and St. Louis, to Montgomery and Troy, respectively, are handled at Montgomery by the L. & N. road. The proportions of through rates received by the Alabama Midland and Georgia Central railroads between Montgomery and Troy on business from Louisville, Cincinnati and St. Louis are based on the local rates of the

Alabama Midland Railway, which is the short line between Montgomery and Troy, the long line accepting the same proportions. The expense of handling local freight is greater than the expense of handling through freight per ton per mile. Shipments of freight to Troy are handled by local trains and cannot properly be called through freight, Troy not being a terminal point on the Alabama Midland Railway. The proportion of the through rates received by said roads for the service of transportation from Montgomery to Troy is substantially the local rate to Troy over the Alabama Midland Railway, which is the short line. The rates from Montgomery to Troy are fixed with the approval of the Alabama Railroad Commission for 52 miles; and the same rate would apply between any two points on the Alabama Midland for a similar distance. These proportions are reasonably low, not higher than the rates that are allowed between Montgomery and Troy by the Railroad Commission of Alabama. Indeed, the evidence tends to show that the existing rates are too low, because the Alabama Midland Railway is not earning enough to meet operating expenses, fixed charges, and pay a reasonable dividend. (See testimony of Bradford Dunham, page 272, of The Transcript of Record.)

The Louisville and Nashville Railroad is a great System entirely separate and distinct from the Plant System, of which The Alabama Midland Railway Company forms a part. For the convenience of customers and consignees at Troy goods are frequently shipped under through bills of lading, in cars with seals unbroken, from western cities like Louisville, St. Louis and Cincinnati *via* Montgomery to Troy, being delivered by the L. & N. Railroad at Montgomery to The

Alabama Midland Railway, to be transferred over its line, a distance of 52 miles to Troy. The through rate to Troy from any western market is virtually made up by the addition of the *through* rate to Montgomery *plus* the local rate to Troy. There is no law which can force connecting inter-state railroads to form continuous lines of transportation or issue through bills of lading. If the L. & N. Railroad Company refused to issue a bill of lading on a shipment of goods from a western market farther than Montgomery, a station on its own line, the Troy merchant would be compelled to pay the Midland's local rate from Montgomery to Troy before he could get those goods carried over the last named road to their destination. Mr. Justice Brewer so held in the Osborne case. He declared: "No power existed at common law, and none is given by the Act to Court or Commission to *compel* connecting companies to contract with each other, to abandon full control of their *separate* roads, or to unite in a joint tariff."

C. & N. W. R. R. vs. Osborne, 10 U. S. App., 435.

L. R. & M. R. vs. St. L., I. M. & S. Ry. Co., 41 Fed. Rep., 559.

K. & L. Bridge Co. vs. L. & N. R. R. Co., 37 Fed. Rep., 567.

Express Cases, 117, U. S. 1.

The learned Judge, Hon. John Bruce, in the opinion rendered in this cause in the Circuit Court of the United States for the Middle District of Alabama, clearly recognized the fact that neither the act to regulate commerce nor any statute of the United States could compel connecting lines to abandon full control of their *separate* properties, or to unite in a joint tar-

iff; and that merely giving a through bill of lading, for the convenience of consignor and consignee, did not, without more, constitute a joint tariff or through rate. He said:

"The evidence shows that in cases of transportation of property from Northwestern points (such as St. Louis, Cincinnati or Louisville) to Troy, Alabama, the shipments come to Montgomery, and from there to Troy; that the rate is so much from such shipping points to Montgomery; that the Alabama Midland Railway charges what is called the local rate from Montgomery to Troy; and this is complained of. The Troy parties claim that they shall not only have the advantage of the reduced rates between the shipping points and Montgomery, but that they are entitled to such reduced rates from Montgomery to Troy. The same thing is claimed on cotton shipped from Troy to New Orleans *via* Montgomery, which is a combination of a *through* rate to New Orleans from Montgomery *plus* the local rate from Troy to Montgomery.

"The evidence shows that such a rate would be absolutely ruinous to the Midland; that it would not pay operating expenses; *and, besides, there is no section of the law under which such contention can be maintained.*

"Again, in this connection, and by way of illustration, it may be asked by what right, or by what rule, shall a common carrier, whose duty it is to serve the public impartially, be required to carry the goods shipped by a Cincinnati merchant, *via* Montgomery, to his customer at Troy, Alabama, for a less rate than is charged upon goods of the same class shipped by a Montgomery merchant to his customer at Troy,

Alabama? And does not the contention here that Troy parties are entitled to the same rates per ton per mile from Montgomery to Troy that they get from the shipping points in the Northwest to Montgomery invoke a violation of the spirit, if not the letter, of the law itself, and show that such contention cannot be sustained?

"There is a suggestion, however, because the transportation is under a common control or arrangement for a continuous carriage or shipment and under a through bill of lading, this operates, under the act, upon the rates that the roads participating in the carriage shall charge. *Such a view as that cannot be maintained under any section of the act.* By the first section of the act, it (the act) is made applicable to cases where the transportion is under a common control or management, a point which has not and could not be questioned; but that such clause eliminates from the 4th section of the act the words 'under substantially similar circumstances and conditions,' can not and is not contended.

"In any aspect of the case it seems impossible to consider this complaint of the Board of Trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central railroads, in the matter of the charge upon property transported on their roads to or from points east or west of Troy, as specified and complained of, as obnoxious to the 4th, or any other section, of the Interstate Commerce Act. The conditions are not substantially the same and the circumstances are dissimilar, so that the case is not within the statute."

It is pertinent to ask:

If all of the above lines are to be enjoined from charging a higher rate to Troy than to Montgomery how are the roads which carry goods from Montgomery to Troy to be paid for their service ?

The roads coming into Montgomery from the Northwest and Northeast will decline to join in making through rates to Troy if they are to be forced to pay for carrying the goods from Montgomery to Troy: and the roads operating between Montgomery and Troy will refuse to carry the goods unless they, too, are paid something for their services; and there is no provision of law which can compel them to join in making any such through rates.

On this subject the Supreme Court of the United States in Stone v. Farmer L. & T. Co. (116 U. S. 307–331), the Chief-Justice delivering the opinion of the court, used the following language:

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Dow v. Beidelman, 125 U. S. 680–689.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418–458.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339–344.

As to the Second Order of the Commission.

There is no evidence that any cotton has ever been shipped from Troy to New Orleans *via* Montgomery;

and, therefore, the Interstate Commerce Commission is needlessly concerning itself about a vain and useless thing—an immaterial issue; literally, "much ado about nothing." Cotton from Troy goes eastward to the nearest Atlantic ports, and not backwards to the Gulf. There is no reason why the Midland Railway should be required to haul cotton to Montgomery when destined to New Orleans for any less compensation than when destined to Montgomery proper. The rate, 23 cents per 100 lbs. for rail transportation on cotton, in force between Troy and Montgomery, was sanctioned by the Railroad Commission of Alabama as a fair remuneration for the distance, and is shown by the evidence to be reasonably low. No reason has attempted to be given why it should be decreased.

The people of Troy, evidently, would be perfectly satisfied if the rates to Montgomery were raised as high as Troy rates. And there can be no doubt that the Alabama Midland Railway would gladly make the Montgomery rates even higher than the Troy rates; because it needs all the revenue it can obtain to pay operating expenses, but these rates, being in existence when the Midland Railway was opened and put in operation in the year 1890, it was compelled either to accept them or surrender entirely all claim to Montgomery business.

It is impossible for the Alabama Midland Railway to increase the Montgomery rates, because of the sharp competition to that point. If it were legally in the power of the Alabama Midland Railway to refuse to take Montgomery business and to withdraw from all competition there, the consequences would be disastrous to it—a total loss of such revenue as it has here-

tofore derived and enjoyed from that source, without any corresponding benefit to the town of Troy; and, as this road has not even paid operating expenses since its organization and completion, it is manifest it can not afford to lose any of its revenues. It is the spirit —the genius of the law—to compensate every disadvantage by some counterbalance of good.

As to the Third Order of the Commission.

The Commission ordered the roads participating in the traffic involved from charging and collecting on shipments of cotton from Troy, *for export via* the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a higher rate to those ports than is charged and collected on such shipments from Montgomery. We submit the evidence shows that this method has been changed. The lowest combination is not now the established way of making rates for export from Montgomery, but, instead thereof, the agreed rates to each American port are used as the inland proportion of the export cotton rate, either from Montgomery or Troy.

As to the Fourth Order of the Commission.

The answer is easy. The relative figures quoted are no longer the correct rates on cotton from Montgomery and Troy to Charleston and Savannah, having been increased from 40 to 45 cents at Montgomery against 47 cents per hundred pounds from Troy to the same points. As there is no question about the fact that effective competition is in operation by water from Montgomery, as we will endeavor hereafter to demonstrate, these rates, which indicate but slight differences,

cannot properly be regarded as unjust; particularly since the building of the Alabama Midland Railway as a competitive line caused a reduction in the cotton rates from Troy to Savannah of 8 cents per 100 lbs. or 40 cents per bale, leaving now only 2 cents per 100 lbs. in favor of Montgomery, when formerly there was a difference of 10 cents per 100 lbs. As heretofore explained in reference to other rates, the Alabama Midland also found the 45 cents rate established by lines not passing through Troy in operation at Montgomery, and it had no part in fixing the same.

As to the Fifth Order of the Commission.

On June 10th, 1869, the Montgomery & Eufaula Railroad was opened from Montgomery to Union Springs—40 miles; and on June 15th, 1870, the Mobile & Girard Railroad was opened from Union Springs to Troy—31 miles. Those two lines, aggregating 71 miles, gave to Troy its first railroad outlet.

Persons shipping to Troy from New York, Baltimore and the Northeast paid at that time a through rate from those points to Montgomery, and also a local rate for 71 miles from Montgomery *via* Union Springs to Troy; and every person at Troy was doubtless satisfied —these rail rates being, of course, very much cheaper than the wagon rates which had previously prevailed between Troy and Montgomery.

The Alabama Midland Railway was not open for business until May 22d, 1890. Prior to that time Troy had never had as low rates as Montgomery from New York, Baltimore and the Northeast.

The following are the combined rates of rail and water lines controlling business from Eastern markets, to-wit:

	1.	2.	3.	4.	5.	6.
New York to Troy	1.36	1.17	1.03	.89	.74	.61
New York to Montgomery	1.14	.98	.86	.73	.60	.49
Montgomery lower than Troy	.22	.19	.17	.16	14	.12
Authorized by the State Commission, Montgomery to Troy	.42	.39	.35	.32	.26	.21

While it is true that the Alabama Midland Railway carries Eastern goods through Troy to reach Montgomery, the Central Railroad does not go through Troy to Montgomery; neither do the lines of the Richmond & Danville, nor the East Tennessee, Virginia & Georgia Railroads go through West Point; but all of them transport New York and Montgomery business. When the Alabama Midland Railway was completed to Montgomery, it was confronted by these rates, which were in effect by lines which did not reach Montgomery *via* Troy.

The local rate of the Alabama Midland Railway on first-class freight from Montgomery to Troy, as approved by the Railroad Commission of Alabama, is 42 cents per 100 lbs. The through rate on first-class freight (sea and rail) from New York to Montgomery is $1.14 per 100 lbs. The combination of said local and through rates would make a total rate of $1.56 per 100 lbs. from New York to Troy. The rate actually charged by the Alabama Midland Railway and its connections from New York to Troy is only $1.36 per 100 lbs., or 20 cents per 100 lbs. less than the combination rate which Troy paid before the Alabama Midland Railway was opened.

The people of Troy now say that they are dissatisfied with their rates. This dissatisfaction arises not so much from the fact that the rates to Troy are too high,

but that the rates to Montgomery, in their opinion, are too low.

Shall these struggling railroads be forced to increase rates at Montgomery, Columbus and Eufaula, or accept the alternative of reducing rates to intermediate points which have not their natural advantages, thereby depleting their already meagre revenues? Can it be contended that the competition at Montgomery, Columbus and Eufaula is imaginary? The best refutation of such an assertion or assumption would seem to be the fact that for years past the present adjustment of comparative rates has existed, in the face of the unpalatable truth that the earnings of the Alabama Midland Railway, the Montgomery and Eufaula Railroad and the Mobile and Girard Railroad, respectively, are not adequate to pay operating expenses, to say nothing of dividends.

The mileage of the Alabama Midland Railway is, in round numbers, 208 miles, including the Luverne Branch, and both parts of the road in Alabama and Georgia. The cost of its construction was about $18,000 per mile. The gross earnings of the Alabama Midland Railway for the fiscal year from July, 1892, to July, 1893, inclusive, were $484,818.66. Operating expenses for the same period were $568,362.34, leaving a large deficit. (See testimony of Bradford Dunham, page 272 of the Transcript of Record.) The evidence shows that the Alabama Midland Railway has been managed economically, skillfully and honestly. A corps of agents, at all important points, have been employed to solicit and secure traffic for the road, and diligent methods adopted to procure a fair proportion of competitive business. During the fiscal year from

the 30th of June, 1892, to July 1st, 1893, the amount of revenue derived from the non-competitive freight traffic of the Alabama Midland Railway was $174,588.43, and during the same period the revenue derived from the competitive freight traffic was $152,862.33. (See testimony of Lee McLendon, Transcript of Record, page 352.)

It is apparent, therefore, that to compel the Alabama Midland Railway Company, in order to retain its Montgomery business, to reduce its Troy rates, so as to have them not higher than Montgomery rates, would be tantamount to forcing this railway to retire altogether from the field of competition for Montgomery business, for the simple reason that, as this road is not earning even operating expenses, it is in no condition to reduce either local or competitive rates. To save it from bankruptcy and ruin it needs every dollar it can secure from every available and legitimate source.

As to the Sixth Order of the Commission.

The argument against this order is practically the same as previously made.

The phosphate rock rates are controlled by the rates on fertilizers, being the same as on fertilizers to Montgomery and something less than on fertilizers to Troy. The rates to both Montgomery and Troy are quite low in themselves; the Montgomery rate being made as low as $3.00 on account of the very much lower rate on fertilizers from Pensacola to Montgomery—$1.80 per ton.

It can not reasonably be claimed that 22 cents per ton (which is the excess of the Troy over the Montgomery rate) is an unjust discrimination when the

local from Montgomery to Troy is considered. The Alabama Midland Railway had nothing to do with fixing this $3.00 rate per ton on fertilizers—the same having been established by lines participating therein, which did not pass through Troy *en route* to Montgomery, and the Midland Railway, therefore, had no other alternative than to adopt the same rate, or else determine not to share in the business at all; and not to share in the business could not possibly have helped Troy. The present difference of 22 cents per ton amounts to a trifle over one cent per hundred pounds. Before the completion of the Alabama Midland Railway to Troy the rate on Phosphate rock from

Charleston, S. C., was $4.60 per ton.
The rate now is - - 3.22 per ton.
Reduction, - - - - 1.38 per ton, or 30 per cent.

These defendants, therefore, think they are justified in denying that the Central Railroad of Georgia and the Alabama Midland Railway, and their connections, unjustly discriminate against Troy in favor of Montgomery on the rates charged and collected on phosphate rock from the South Carolina and Florida fields, the rate to Montgomery being $3.00 per ton and to Troy $3.22 per ton; or that the said greater rate to Troy than to Montgomery over the Midland Railway is in violation of the long and short haul clause of the Act to regulate commerce. The prohibition is limited to cases in which *the circumstances and conditions are substantially similar.* On the contrary, it is insisted that the *circumstances and conditions at Montgomery are totally dissimilar from those which exist at Troy;* that Montgomery is situated on a navigable river, is the

terminus of the Montgomery & Eufaula Railroad, the Alabama Midland Railway and the S., A. & M. road, and is located on the lines of the Louisville & Nashville Railroad and the Western Railway of Alabama, and is thus afforded many outlets; that foreign ports, as well as the Northern and Eastern markets of the United States, are reached by New Orleans, Mobile, Pensacola, Jacksonville, Brunswick, Savannah, Charleston, West Point and Norfolk; and the rail lines running to these several Eastern points necessarily compete fiercely with the water lines in order to secure a portion of Montgomery's business; that the rates to and from Montgomery to these South Atlantic and Gulf seaports are lower by water and can not be controlled by the rail lines running into Montgomery; that Montgomery and the surrounding country (Troy included), both producers and consumers, are benefitted by the competition at Montgomery as to all commodities, phosphate rock included; that the rates to and from Troy and other localities, *in essential respects similarly situated*, have been lowered by reason of this competition, and are themselves relatively fair and reasonable.

In short, these said railway companies undertake to defend the existing rates.

We must be pardoned for earnestly insisting, in this connection, that the earning capacity of these railways enter very seriously into the consideration of the questions under discussion. And we invite the attention of this Court to the Annual Report (1893) of the Interstate Commerce Commission, page 163. Under the head of "Reasonable Rates," the Commission say:

"In passing upon the reasonableness of rates, the

question whether they afford the carrier a proper return for the service rendered is to be considered, as well as the result of the business to the shipper or producer of traffic."

It may not be amiss, while on this subject, also to invite the attention of this Honorable Court to a few admirable extracts taken from the Second Annual Report of the Interstate Commerce Commission, published in 1886, page 19, in which this language is used :

"If it is important to the public that a railroad once constructed should be maintained, the ability to make charges that will render its maintenance possible is also of public importance. When, therefore, the rate sheets are such that reasonable returns are not probable, a public injury is threatened, and the injury is accomplished when the natural result of bankruptcy is realized. It is of little importance that in the meantime the public reap an apparent benefit from the very low rates. The apparent benefit is almost always illusory, for the unmunerative rate sheets are seldom evenly balanced."

Again, on page 23 of the same report, they say:

"Very low rates may possibly be injurious to the public interest, even when they are relatively just and steadily maintained. This may be so, irrespective of the fact that it is always for the interest of the country that the capital invested in any great and necessary industry should be reasonably remunerative. Independent of any returns to stockholders, it is important that rates be remunerative, because of the effect that insufficient revenue may have upon the service performed for the public.

"No State, in the exercise of its controlling authority,

would ever deliberately prescribe for a railroad company a tariff of charges which would fall below a reasable compensation for the service performed. Abundant reasons for so abstaining would be found in the fact that it would not be for the interest of the citizen that it should be so. The people want good railroad service and they ought to have it at fair rates, but to give them this, it is necessary that the road should be kept in good condition and well equipped; that the trains be sufficiently manned and well handled; that competent servants be employed and fairly paid, and that the new company avail itself of new appliances which are calculated to make the service more speedy, convenient and safe.

"But good service and low rates are antagonistic ideas; if the latter be insisted upon the former is not to be expected. Many times, in railroad history, it has been found, on inquiry into the cause of some great railroad calamity, that it was due to the fact that some railroad bridge had become weak, some tunnel insufficiently guarded, some machinery defective, or some employe incompetent or wanting in vigilance because of overwork. If the road was prosperous the management would thus be shown to be inexcusable, perhaps criminal; but if the road was not prosperous and for some reason the management had been forced to make such rates that would not give the necessary revenue for a safer service the blame for such a calamity may be fairly subject to apportionment. The public can never be in the wrong in demanding good service when fair rates are conceded; and an enlightened public sentiment will never object to fair rates when it is understood that good service is conditional upon them."

Lower Rates.

It must be borne constantly in mind, too, that before the Alabama Midland Railway was completed to Troy, the rates to Troy were higher than they are now. To recapitulate. The completion of the Alabama Midland R'y reduced the Eastern rates, as the table below shows:

New York Rates to Troy Prior to Opening of Alabama Midland Road.

1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	H.	F.
1.74	1.47	1.27	1.05	.80	.69	.53	.70	.59	.54	.90	1.00	1.16

Rates at Present.

1.36	1.17	1.03	.89	.74	.61	.48	.58	.47	.45	.70	.82	.92

Reduction of Rates.

.38	.30	.24	.16	.06	.08	.05	.12	.12	.09	.20	.18	.24

Rates on Cotton to Savannah.

Prior to Ala. Mid. R'y. - - - - 55 cents per 100 lbs.
At present - - - - - - - - 47 cents per 100 lbs.

Reduction, - - - - - - - - 08 cents per 100 lbs.
Or 40 cents per bale.

The tariff proposed in this case by the Commission, as disclosed by their orders, in view of the testimony as to the earnings of the railroads between Montgomery and Troy, is both unjust and unreasonable.

The Supreme Court of the United States in the case of Reagan v. Farmers' Loan and Trust Company (154 U. S. Rep., p. 410) discussing this question, held that the tariff therein proposed by the State Railroad Commission of Texas was unjust and unreasonable. Mr. Justice Brewer used this language:

"The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to a suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts, during the six or eight months that it has been enforced, amounts to over $150,000. Can it be that a tariff, which under these circumstances has worked such results to the parties whose money built this road, is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered re-results?" * * * * * * *

"Justice demands that everyone should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

* * * * * *

"The stock has never received anything in the way of dividends; for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses. Such an

averment, so supported, will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable."

WATER COMPETITION.

The Interstate Commerce Commission decided in this case (but upon evidence materially different from what this Transcript of Record presents) that water competition does not exist at Montgomery of such controlling force as to warrant a lesser charge for a longer haul to that point than for a shorter haul to Troy over the same line. It is difficult to reconcile this ruling with a previous decision of the Commission in another case, No. 325, and known as "The Atlanta and West Point all-rail route from Cincinnati and other Ohio river points," reported in 5th Volume of Interstate Commerce Reports, pages 346–408, embraced in the consolidated cases of R. R. Commission of Georgia v. Clyde Steamship Co., et al., 5th I. C. C. Rep., 324. The following strong language is used: "We do not think this case comes within the ruling of the fourth section. It is conceded by the complaint, and the fact appears in evidence, that water competition exists at Montgomery by the Alabama River. Opelika, the other longer distance point, is benefited by rates lower than it would receive were it not for the influence of competition at Montgomery, and West Point is also favored thereby, though in a less degree. But the inherent defect in the complaint is that the transportation is not over the same line in the same direction to both the longer and shorter distance points. The shorter is not included within the longer distance. Traffic for Montgomery and Opelika, and even West

Point, routed by the Louisville & Nashville, one of the initial defendants, goes over a wholly different route, and as to the Cincinnati, New Orleans & Texas Pacific, another initial defendant, while the evidence is not clear upon the point, still, the length of its line leads us to believe that in handling Cincinnati traffic for Montgomery and Opelika it carries such traffic first to Birmingham and forwards to Montgomery and Opelika by connecting lines from that point. Freight from Ohio River points below Henderson may possibly go through Atlanta, but the principal point of shipment to which our attention was directed by the evidence is Cincinnati. The complaint in this case must be dismissed."

Now, what is the difference in these cases? If there is water competition at Montgomery in connection with Cincinnati business which justifies the lesser charge to Montgomery than LaGrange, Ga., although the Montgomery business from Cincinnati passes through LaGrange, why does not the same water competition warrant the lower New York rates to Montgomery than to Troy? Are not the conditions of competition from New York *via* the Alabama River the same as from Cincinnati; if not, in what does the difference in conditions consist? The Commission, in the case cited *supra*, having recognized the force of water competition at Montgomery, it would seem that the proportions between Montgomery and Troy used in constructing the total rates between Ohio River points—say Louisville—being no more than the local rates established by the Railroad Commission of Alabama between Montgomery and Troy, the differences created in the competitive rates (Louisville and Montgomery and

Louisville and Troy) cannot be unjust; nor, for the same reasons, can the Troy rates be held unjustly high as compared with Columbus.

The Interstate Commerce Commission, in this case, refers to the fact that the proportion of the rate from Montgomery to Troy is from four to seven times as large per mile as that from Louisville to Montgomery. This has no significance, under the circumstances, as the proportion from Louisville to Montgomery is as high as the force of water will permit it to be; in addition to which, the Louisville & Nashville Railroad between Louisville and Montgomery is a great trunk line, not confined to the limited business of Troy or the Alabama Midland Railway, but enjoys most of the Montgomery business and carries an immense tonnage to all railway points south and east of Montgomery, in Florida, Georgia and the Carolinas; while the railroads between Montgomery and Troy are confined to a comparative small movement of tonnage, largely at low rates, on account of water competition on the coast of Georgia and Florida.

THE ALABAMA RIVER IS A POTENTIAL FACTOR, A CONTROLLING FORCE, IN REDUCING RATES TO MONTGOMERY.

A few years ago when there was considerable difference in the rates of freight between Montgomery and Mobile, the merchants of the former city put two steamers on the Alabama River, "The Jewel" and "The Alabama," and operated them actively. Large quantities of freight were shipped from the West *via* Mobile upon those boats to Montgomery, consisting of flour, grain, molasses, oats, corn, flasks, cement, whis-

kies and case goods, such as potash, salmon, starch, sardines, &c. These boats hauled many car loads. Large shipments came from Boston, New York, Philadelphia, Baltimore and other Eastern cities to Mobile, thence by the river on said boats to Montgomery, and were received at various times, consisting of coffees, sugar, potatoes, soap, syrup, bagging and ties, case goods, &c., and extending over a period of several years up to 1894, when the rates complained of were in existence. Similar shipments are now being made (but in not such large volume as then) by sailing vessels to Mobile and thence by steamers to Montgomery. At present these goods are transported mainly by sailing vessels (Benner Line) in considerable quantities, and the shipments are growing larger all the while on account of the discrepancy still existing between rail and water rates to Mobile. The Alabama River is navigable all the year round from Montgomery to Mobile, a distance of 367 miles. While the Merchant Line is not now in operation, there are three lines of steamers plying the Alabama River between these cities, and running the boats "Tinsie Moore," "Alto," "Nettie Quill" and "Carrier."

Many witnesses testify to the fact that water transportation, coupled with the further fact that said river is navigable by steamboats between Montgomery and Mobile during every month in the year, has the effect of making the rates charged by railroad lines between and to these cities lower than they otherwise would be —in short, enabling shippers to send their freight by river at low rates, and thereby keeping down the rail rates between and to these points. The immediate effect of raising rail rates to Montgomery would be the

movement of immense quantities of freight by water to Mobile; and the transfer of many goods from the West *via* the Ohio and Mississippi Rivers down to New Orleans, from there to Mobile, and thence up the Alabama River to Montgomery. It would bring freight from the East in the manner heretofore explained, and would also divert by means of river transportation a large portion of commerce from this section of Alabama to Mobile, and thence by steamer direct to European ports. The fact that there is organized water opposition to the railroads, through the medium of this river, both from the East and West, would tend to establish the fact that water transportation is of controlling force—an active and potential factor—in fixing rates to Montgomery. It hangs like the "sword of Damocles" over competing railway lines. It is a standing menace. What has been done once can easily be done again. "An ounce of prevention is worth a pound of cure." The river serves the purpose of reducing, and keeping reduced, the rail rates to Montgomery. The Commission, in all of their decisions except the Troy case, concede that geographical position and conditions must prevail in establishing rates to jobbing cities, where they have the benefit of water transportation. There are millions of dollars invested as capital in this jobbing business, and, in fact, Montgomery is a jobbing and wholesale city; while Troy, confined within the narrow bounds of a few counties adjacent thereto, cannot be considered, in any sense of the word, or upon any principle of justice, a jobbing town.

(See testimony of W. F. Vandiver, p. 290 of Transcript of Record.)

THE PROOF DISCLOSES CLEARLY AND UNMISTAKABLY THAT THE CIRCUMSTANCES AND CONDITIONS AT MONTGOMARE TOTALLY DISSIMILAR FROM THOSE WHICH EXIST AT TROY.

The words "circumstances and conditions" mean the conditions that govern railway traffic and the circumstances under which it is transported. "They comprehend all the circumstances and conditions that may justify differences in rates, such as competition with other railroads and with water routes, the volume and character of business at different points, the difference in terminal expenses, and the cost of service in each case." The words "substantially similar," inserted in the act, were intended to mean something. They impart enough latitude to the comparison to enable the courts to exercise sound discretion and common sense in passing upon cases that may arise. A reasonable and liberal interpretation of these words will enable the law to be administered fairly and justly, without interfering with the general commerce of the country.

The evidence, taken by affidavits and depositions, as well as upon interrogatories, shows that the estimated population of the city of Montgomery, within police jurisdiction, is about 40,000. The distance to the nearest coal field is not over sixty miles. There are 563 mercantile firms in said city, while the capital invested in manufacturing and industrial enterprises is $3,000,000. The volume of business done in any given year, within the corporate limits of said city, is $40,000,000.

The railroads concentering in the city of Montgomery are South & North and the Montgomery & Mobile Railroads, constituting a part of the Louisville & Nashville

System; The Alabama Midland Railway and the Luverne Extension, constituting a part of the Plant System; the Savannah, Americus & Montgomery Railroad; the Western Railway of Alabama; the Montgomery & Selma Road, and the Montgomery & Eufaula Railroad; the last named forming a part of the Georgia Central System. These various railroads run from a common centre north, northeast, east, southeast, south, southwest, west and northwest.

Montgomery is situated at the head of navigation of the Alabama River, reaching by water and rail transportation six Gulf and Atlantic ports.

Tonnage, as derived from the most accessible and trustworthy sources, for the year 1891-92, ending March 1st, 1892, received by various railroads at Montgomery proper, was 18,829,877 pounds. Tonnage of west and southwest freight received for this city and connections, during said year, was 647,880,688 pounds, or 21,596 car loads.

Montgomery is the capital of Alabama and the place of residence of the State officials—an historic city, visited by many thousand people every year. It has a large number of public buildings, amongst them being the State House, Federal Court Room, Post Office, Land Office, etc.

The business on the Alabama River, according to the report of the United States Engineer for the year 1891, was 52,349 bales of cotton carried by boat and 44,500 tons of freight. The value of the commerce on the Alabama River that year (1891) was $8,175,650. Montgomery receives from 125,000 to 165,000 bales of cotton annually. It has great warehouse and compressing facilities for handling, marketing and disposing of

this crop; and its wholesale and retail trade, estimated as high as $40,000,000 annually, as above stated, reaches into four States. It is also a great lumber distributing market—the local point of trade for a large territory. It has about 115 manufacturing establishments of various kinds, large and small, including electric light and gas works; and it manufactures beer, soap, ice, cars, fertilizers, cotton seed oil, sash and blinds, cotton seed meal, confectioneries, barrels, stoves, engines, boilers, cane mills; wagons, buggies, brooms and various other articles too numerous to particularize.

Montgomery has three cotton factories, owned and controlled by persons residing here, employing hands to the number of 1,200, and consuming cotton to the amount of 18,000 bales; besides, has 41 manufacturing and industrial enterprises of various kinds, employing total number of 2,700 hands.

The cotton received for the year 1891 amounted to 165,000 bales, while the cotton compressed for said year was 156,324 bales.

There are 21 wholesale firms who buy from the west, and 11 wholesale firms who buy from the east. Montgomery is entitled to the trade of and reaches points in Southwest Georgia, Florida, Central and South Alabama and West Mississippi.

Troy is an inland town, fifty-two miles southeast of Montgomery and eighty-five miles slightly southwest of Columbus, Georgia. The population of Troy does not exceed 4,000; the cotton receipts at that point on an average are about 30,000 bales annually; while the volume of trade for any given year does not amount to more than three million dollars. She has only two railroads, The Alabama Midland and the

Mobile & Girard. The differences existing between the circumstances and conditions affecting traffic to and from Montgomery and to and from Troy are, that Montgomery has six or seven competing railroads and a navigable river, and Troy has no water way and only two railroads. The mere statement of these facts would seem to be a convincing argument to demonstrate that *the circumstances and conditions of Montgomery and Troy* as to transportation facilities are totally dissimilar.

THE PROOF ALSO SHOWS THAT THE CIRCUMSTANCES AND CONDITIONS AT COLUMBUS ARE DISSIMILAR IN MANY IMPORTANT PARTICULARS FROM THOSE WHICH EXIST AT TROY.

There are three steamers running between Columbus, Eufaula and Apalachicola. Their names and tonnage are; "Flint," with a tonnage of 135.57 tons; "Maid," with a tonnage capacity of about 130 tons; and "Bay City," with a tonnage capacity of about 100 tons. The average time required for a boat to go from Columbus to Apalachicola and return is about five days, and from Eufaula and return is about four days.

The difference existing between the circumstances and conditions affecting the transportation of traffic to and from Columbus and those affecting Troy are as follows: Columbus being situated on a navigable river naturally has the advantage over Troy in the way of rates. Troy, being an inland city and about 90 miles from the river, can be reached by rail only.

The following are the routes of transportation between Columbus and the Atlantic seaboard, and also Northern and Eastern cities, viz.: The Central Rail-

road, the Columbus Southern Railroad and the Georgia Midland & Gulf Railroad. There are four steamboat lines from Columbus to the Gulf of Mexico, viz.: The Central Line, People's Line, Columbus & Gulf Navigation Co. and the Merchants' & Planters' Line. The Mobile & Girard Railroad (a part of the Central System) also has connections with the Gulf.

The Chattahoochee River is navigable between Columbus, Eufaula and Apalachicola for six months or more in the year by ordinary river steamboats; and during the summer months it is navigable by small boats and steamers.

The following are competing lines of transportation at Columbus: The all-rail lines—the Central, the Georgia Midland and the Columbus Southern; the all-water lines—the Central Line, the People's Line, Merchants' & Planters' Line and the Columbus & Gulf Navigation Co. These are six railroads that connect with this water route.

The following are transportation routes from Columbus to the Gulf of Mexico: Chattahoochee River, the Central Railroad, Savannah, Americus & Montgomery Railway, the Alabama Midland, and Pensacola & Atlantic Railroad, in addition to the water route above mentioned.

The population of Columbus is more than 20,000 and it is a large manufacturing centre.

IT IS INSISTED THAT THE PROOF SHOWS THAT THE CIRCUMSTANCES AND CONDITIONS AT EUFAULA ARE MATERIALLY DISSIMILAR FROM THOSE WHICH EXIST AT TROY.

The difference between the circumstances and conditions affecting the transportation of traffic to and from

Eufaula and those to and from Troy is as follows: Eufaula is located upon a navigable river, while Troy is situated on no river at all. If there were no railroads to Eufaula she could get all of the goods that come to her by river and could ship every bale of cotton or goods by water, while Troy, without railroads, would have to transport hers by wagons either to Montgomery, Columbus or Eufaula before she could make shipments. The following railroads enter Eufaula: South Western Railaoad, connecting at Macon, Georgia, with different systems; the Montgomery & Eufaula connecting at Montgomery with different systems; and the Eufaula & Ozark, connecting with the Alabama Midland Railway at Ozark. Troy has only the following railroads, as has already been shown, to-wit: The Mobile & Girard and the Alabama Midland. In addition to the railroads entering Eufaula, the Savannah, Americus & Montgomery Railroad comes within 18 miles and is accessible by wagon roads, passable all the year round; the Abbeville Southern Railway, a part of the Plant System, is only 25 miles from Eufaula, and is also accessible by wagon roads, passable all the year round. And in addition to the river connections above mentioned with the Alabama Midland and the Plant System, she has river connections also with the Florida Central & Peninsular, the Louisville & Nashville and the Columbus Southern roads. It is claimed, therefore, that if Eufaula had no railroads running into the city she would have ample and competitive communication with outside railroads through and by means of her river route, to-wit: The navigable Chattahoochee and Apalachicola Rivers, which open up to Eufaula three independent railroad systems. Eufaula is naturally a

strong competitive point, while Troy is an inland town having no facilities for an outlet except by rail.

There is one line of rail transportation from Eufaula to the Atlantic seaboard, the Central Railroad, running to all points on the Atlantic coast; and also the river line of transportation to Savannah, Brunswick and Fernandina.

The population of Eufaula is about 6,000.

The following are the manufactories at Eufaula, viz.: Eufaula Cotton Mills, Chewalla Cotton Mills, Eufaula Oil Mills, sash, door and blind factory, two carriage manufactories, gas works, electric light works—all together having about 600 or 700 employes.

UNDER THE PLEADINGS AND ISSUES IN THIS CASE THE COMPLAINANTS OUGHT NOT TO OBTAIN THE RELIEF THEY SEEK. TO GRANT IT WOULD NECESSITATE AN ENTIRE REVISION OF RATES.

The Alabama Midland Railway runs in a southeast direction *via* Troy, Ozark and Dothan to Bainbridge, Ga., a distance of 175 miles, crossing the Chattahoochee River at River Station, now called Alaga, 32 miles west of Bainbridge. It has a branch road, known as the Luverne Extension, deflecting at Sprague Junction, 19 miles south of Montgomery and extending to Luverne, 51 miles due south from Montgomery.

Ozark is 92 miles southeast of Montgomery, 40 miles beyond Troy, and is at the point of intersection of the Alabama Midland Railway and the Savannah and Western Railroad, a part of the Georgia Central System. It has a population of about 3,000, and is in all essential respects as much a competitive point as the town of Troy, is similarly situated and has a territory naturally tributory and equally as large as belongs to Troy.

Dothan is 28 miles from Ozark, 68 miles from Troy, and 120 miles from Montgomery; is, moreover, in close proximity to the Chattahoochee River, has a population of about 4,000, and is the central point of trade or mart for a territory extending into the States of Georgia and Florida.

The Mobile & Girard Railroad, a part of the Georgia Central System, extends from Columbus, Ga., *via* Union Springs, where it crosses the M. & E. R. R.; thence to Brantley, which is about 12 miles on a straight line South of Luverne (the terminus of the Luverne Extension), and thence on to Searight, the Southwestern terminus of the said M. & G. Railroad. Union Springs is 56 miles South of Columbus; Troy 29 miles from Union Springs and 85 miles from Columbus; Brantley is 26 miles from Troy, 35 miles from Union Springs and 111 miles from Columbus. The proof shows (see affidavit of Mr. Talbot) that Brantley is a flourishing new town and has a population of 700 or 800 people.

The strongest contention of the Board of Trade of Troy is that in the shipment of goods, particularly from the Western markets, St. Louis, for instance, through rates are charged to Montgomery and local rates are added from that point to Troy; and that in consequence of these through rates it costs more to ship from Troy, for instance, to Ozark, a distance of 40 miles, than from Montgomery to Ozark, a distance of 92 miles, the longer shipment from the West *via* Montgomery going by or through Troy and the shorter shipment starting at Troy. The same complaint is made as to the long haul rate *via* Columbus to Brantley. It is not contended that shipments of goods originating at either Colum-

bus, Ga., or Montgomery, Ala., respectively, would not reach Troy at a less rate of freight than like shipments would go to Brantley or Ozark, respectively. The through rate from Troy to any Western market, as above shown, is made up by adding the local rate from Troy to Montgomery to the through rate from Montgomery to the West; and this is true, also, as to Ozark, Dothan, Brantley and other points on the lines of these two roads *in all essential respects similarly situated.* To make concessions to Troy in the matter of rates would, manifestly, be unfair to these neighboring towns similarly situated. An examination of the evidence taken in this case will demonstrate, we think, that the alleged greater rate to Troy than to Montgomery is not charged under similar circumstances and conditions; but even if true, it is clear that Ozark and Dothan, on the Alabama Midland Railway, and Brantley, on the Mobile & Girard Railroad, as well as other points on both lines of road, similarly situated as Troy, would be injuriously affected by such a change of rates as the Board of Trade of Troy ask in their own behalf, and would necessitate an entire revision of rates, without having given these other places, above named, an opportunity to be heard.

It would require a reconstruction of rates to all of these towns similarly situated; or else be tantamount to holding that the circumstances and conditions prevailing in the town of Troy are such as to justify making it an exception, under the 4th section of the Act to regulate commerce, as against the local or neighboring stations about it. The proof, we insist, does not show that the circumstances and conditions existing in Troy are so exceptional as to require a revision of rates in

its favor, which would not apply with equal force to other towns similarly situated on the lines of the Alabama Midland and Mobile & Girard Railroads. A change of rates in favor of Troy would materially affect these other towns. The petition in this case does not contain any allegations which would warrant the Commission to grant an entire revision of rates, and "the points to be affected by such an order are not, and were not, before the Commission and have had no opportunity to be heard." No facts have been proven on which the town of Troy can reasonably or fairly predicate a claim for lower rates proportionately than are given to Ozark, Dothan, Brantley, and other points on the line of the Midland and Mobile & Girard roads similarly situated.

Harwell v. Columbus & Western R. R. Co., et al., Interstate Com. Rep., Vol. 1, pp. 250–51.

We repeat, that if Troy is entitled to Montgomery rates, so is every other local station on the Alabama Midland Railway; and if all of the local stations are entitled to competition rates on west-bound business they are also entitled to them on east-bound business; and the Commission has virtually so decided in this case. The effect of the decision, without any allegation to uphold it, is to reduce all local rates, whether west-bound or east-bound, to the proportions received by said railway from competitive rates; and such a sweeping reduction of rates would render it impossible for the road to earn enough to keep it in safe condition. It would follow, therefore, that as the road would lose less revenue from the abandonment of the competitive business than it would by reducing its local rates, it would necessarily abandon the competitive, and hold fast to the local traffic.

Again, the Commission gives as one reason for adopting the Columbus rate for Troy, the fact that the present combination on Columbus to said town of Brantley is less than combinations on Troy; but, in this connection, it is proper to ask what becomes of the respective rights of Brantley and the twenty-nine other towns on the Mobile & Girard Railroad, the fifteen on the Montgomery & Eufaula Railroad and the thirty-seven on the Alabama Midland Railway? If it is sought to grant Troy such rates as will enable the merchants of that town to resell to other points, and then attempt to put the other points on a parity with Troy, manifestly such action will neutralize the advantage of one point over another to such an extent as to prevent the reselling of any of the western commodities between the Alabama towns situated on the railroads adjacent to Troy; and if so, what is to become of the revenues of these railways? There is no question, but if this policy is insisted upon by the Commission and is sanctioned by the courts, it will not only so deplete the earnings of these railways as to destroy their value to their owners, but their efficiency as well to the general public. It will result, necessarily, that there will be no interchange of business between these points in Georgia and Alabama. Therefore, no benefit can accrue to them, but the business, which some of them now control, will be taken away, without helping others, to the bankruptcy and ruin of these transportation lines.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 410, *supra.*

Respectfully submitted,

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Attorney for the Alabama Midland Railway Company

and

The Savannah, Florida & Western Railway Company.

No. 563. 203.

Supplement to Brf. of Baxter
Appell

Filed Mar. 16, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 563.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE ALABAMA MIDLAND RAILWAY COMPANY *et al.*

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Supplemental to the Brief of Ed. Baxter, of Counsel for Defendant.

Extracts from Reports of Alabama Midland

Railways," Published by the

Stock Outstanding.	Bonds Outstanding.	Total Earnings and Income.
4,125,000 (*a*)	3,300,000 (*b*)	126,262 (*c*)
4,225,000 (*e*)	3,300,000 (*f*)	512,136 (*g*)
4,225,000 (*i*)	3,300,000 (*j*)	514,950 (*k*)
4,225,000 (*m*)	3,330,000 (*n*)	430,768 (*o*)
4,225,000 (*q*)	3,300,000 (*r*)	547,955 (*s*)
4,225,000 (*u*)	3,300,000 (*v*)	535,975 (*w*)

* Went into Plan

See "Statisti

(*a*) 1890, p. 366 (*e*) 1891, p. 280 (*i*) 1892, p. 258

(*b*) 1890, p. 367 (*f*) 1891, p. 281 (*j*) 1892, p. 259

(*c*) 1890, p. 504 (*g*) 1891, p. 374 (*k*) 1892, p. 352

(*d*) 1890, p. 561 (*h*) 1891, p. 413 (*l*) 1892, p. 380

way Company as taken from "Statistics of

state Commerce Commission.

Total rating Expenses.	Suplus.	Deficit.	For Year Ending June 30.
38,107 (*d*)	.....	11,845	1890
36,217 (*h*)	75,919	.....	1891
63,847 (*l*)	.....	78,897	1892
32,861 (*p*)	.....	52,093	1893
63,232 (*t*)	44,723	....	1894
10,823 (*x*)	25,152	.. ..	1895

ystem this Year.

' Railways."

(*m*) 1893, p. 266 (*q*) 1894, p. 304 (*u*) 1895, p. 324

(*n*) 1893, p. 267 (*r*) 1894, p. 305 (*v*) 1895, p. 325

(*o*) 1893, p. 382 (*s*) 1894, p. 409 (*w*) 1895, p. 431

(*p*) 1893, p. 390 (*t*) 1894, p. 440 (*x*) 1895, p. 460

"This Court would seem entitled to examine the Statistics, because, by incorporation in an official report, they have become matters of public knowledge," etc.

See brief of Edward B. Whitney, Assistant Attorney General, in Interstate Commerce Commission *v.* Detroit, Grand Haven and Milwaukee Ry. Co., No. 539, Oct. Term, 1896, p. 73.

The petition in this case was filed before the Commission June 29, 1892; and the decision by the Commission was made August 15, 1893. (Trans., p. 52.)

The defendants asked witness McLendon for the earnings and expenses of the Alabama Midland Railway Company for the year during which the case was before the Commission, viz., for the fiscal year from July, 1892, to June, 1893, inclusive. (Trans., pp. 182–352.)

It will be seen that so far from this year 1892–3, being exceptional, there was a deficit three years out of six.

By deducting this total deficit from the total surplus, the net surplus for six years was only $1,959, or $326.50 per annum. The net surplus for said six years would not pay $\frac{1}{10}$ of 1 per cent. on the bonded debt of $3,300,000, to say nothing of $4,225,000 of stock.

Respectfully submitted.

ED. BAXTER,
Counsel for Appellees.